Supreme Court, U.S.
FILED

No. 091131 MAR 17 2010

OFFICE OF THE CLERK

Supreme Court of the United States

DOUG MORGAN; ROBIN MORGAN; JIM SHELL; SUNNY SHELL; SHERRIE VERSHER; AND CHRISTINE WADE,

PETITIONERS,

v.

PLANO INDEPENDENT SCHOOL DISTRICT, ET AL.,

RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

KELLY SHACKELFORD
HIRAM S. SASSER, III
JEFFREY C. MATEER
LIBERTY LEGAL INSTITUTE
2001 Plano Parkway
Suite 1600
Plano, TX 75075
(972) 941-4444

PAUL D. CLEMENT
Counsel of Record
ASHLEY C. PARRISH
CANDICE CHIU
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
pclement@kslaw.com
(202) 737-0500

Counsel for Petitioners

*additional counsel listed on inside cover

March 17, 2010

Additional Counsel for Petitioners:

CLYDE MOODY SIEBMAN
SIEBMAN REYNOLDS
BURG & PHILLIPS LLP
300 N. Travis St.
Sherman, TX 75090
(903) 870-0070

WM. CHARLES BUNDREN
WM. CHARLES
BUNDREN & ASSOCIATES
2591 Dallas Parkway
Suite 300
Frisco, TX 75034
(972) 624-5338

QUESTION PRESENTED

Whether the constitutionality of a public school district's student speech policy imposing a sweeping ban on the distribution of any written material should be evaluated under the "substantial disruption" standard established in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), which this Court has generally applied to restrictions on student speech, or whether because the student speech policy is facially content- and viewpoint-neutral, it should be evaluated under the less exacting "intermediate scrutiny" standard established in *United States v. O'Brien*, 391 U.S. 367 (1968), which this Court has applied to restrictions on expressive conduct that have only an incidental effect on First Amendment freedoms.

RULE 14.1 STATEMENT

The following parties are not listed on the caption but participated in the proceedings below.

1. Lynn Swanson, in her individual capacity and as Principal of Thomas Elementary School.

2. Jackie Bomchill, in her individual capacity and as Principal of Rasor Elementary School.

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 14.1 STATEMENT ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 3

JURISDICTION 3

CONSTITUTIONAL PROVISION INVOLVED 3

STATEMENT OF THE CASE 4

A. The Initial Student Speech Policy 4

B. The Amended Student Speech Policy 8

C. The Decisions Below 11

REASONS FOR GRANTING THE PETITION 13

I. The Courts of Appeals Are Sharply Divided Over Whether *Tinker* Applies To Content- And Viewpoint-Neutral Restrictions On Student Speech. 14

II. The Decision Below Cannot Be Reconciled With This Court's Student Speech Jurisprudence. 21

A. The Fifth Circuit Misapplied *O'Brien* 22

B. The Fifth Circuit Misinterpreted *Tinker*. 24

C. The Fifth Circuit Undervalued Student Speech. 27

III. This Case Presents An Ideal Vehicle For Resolving An Important, Recurring Constitutional Issue. 30

CONCLUSION 34

APPENDIX

TABLE OF APPENDICES ..... App-i

Appendix A

Opinion of the United States Court of Appeals for the Fifth Circuit, dated Dec. 1, 2009 ..... App-1

Appendix B

Order of the United States Court of Appeals for the Fifth Circuit Denying Rehearing En Banc, dated Jan. 5, 2010 .... App-15

Appendix C

Opinion of the United States District Court for the Eastern District of Texas, Sherman Division, dated Feb. 26, 2007 .... App-17

Appendix D

Order of the United States District Court for the Eastern District of Texas, Sherman Division, Granting Motion to Certify Court Order as Final, dated June 30, 2008 ..... App-21

Appendix E

Opinion of the Magistrate Judge Denying Plaintiffs' Motion for Partial Summary Judgment (Facial Challenge to PISD Policies) and Granting Defendant Plano ISD's Cross Motion for Summary Judgment, dated Jan. 30, 2007 ..... App-24

Appendix F

Opinion of the Magistrate Judge Granting in Part and Denying in Part Individual Defendant's Motion to Dismiss Based on Qualified Immunity, dated Feb. 20, 2007 ..... App-60

Appendix G

Plano ISD Policy *Student Expression: Distribution of Nonschool Literature*, issued Oct. 20, 2003 ..... App-95

Plano ISD Policy *Student Expression: Distribution of Nonschool Literature*, issued April 4, 2005 ..... App-98

Preamble to Plano ISD Policy *Student Expression: Distribution of Nonschool Literature*, issued Nov. 1, 2005 ..... App-106

TABLE OF AUTHORITIES

Cases

Barnes v. Glen Theatre, Inc.,
501 U.S. 560 (1991) 22

Barr v. Lafon,
538 F.3d 554 (6th Cir. 2008) 19

Bartnicki v. Vopper,
532 U.S. 514 (2001) 23

Bethel Sch. Dist. No. 403 v. Fraser,
478 U.S. 675 (1986) 1, 15, 32

Bigelow v. Virginia,
421 U.S. 809 (1975) 23

Blau v. Fort Thomas Pub. Sch. Dist.,
401 F.3d 381 (6th Cir. 2005) 19

Board of Ed. of Westside Community Schs. (Dist. 66) v. Mergens,
496 U.S. 226 (1990) 30

Brown v. Board of Educ.,
347 U.S. 483 (1954) 31

Canady v. Bossier Parish Sch. Bd.,
240 F.3d 437 (5th Cir. 2001) 11, 18, 21

Chandler v. McMinnville Sch. Dist.,
978 F.2d 524 (9th Cir. 1992) 19

Good News Club v. Milford Central Sch.,
533 U.S. 98 (2001) 30

Grayned v. City of Rockford,
408 U.S. 104 (1972) 25, 26, 28

Guiles v. Marineau,
461 F.3d 320 (2d Cir. 2006) 16, 17, 21

Hazelwood Sch. Dist. v. Kuhlmeier,
484 U.S. 260 (1988) 16, 26

Holloman v. Harland,
370 F.3d 1252 (11th Cir. 2004) 17

Jacobs v. Clark County Sch. Dist.,
526 F.3d 419 (9th Cir. 2008) 20, 24, 28

Keyishian v. Board of Regents of Univ. of State of N.Y.,
385 U.S. 589 (1967) 31

Lowry v. Watson Chapel Sch. Dist.,
540 F.3d 752 (8th Cir. 2008) 16

M.A.L. v. Kinsland,
543 F.3d 841 (6th Cir. 2008) 19, 20

Marks v. United States,
430 U. S. 188 (1977) 26

McIntyre v. Ohio Elections Comm'n,
514 U.S. 334 (1995) 23

Morse v. Frederick,
551 U.S. 393 (2007) ..... passim

Newsom v. Albemarle County Sch. Bd.,
354 F.3d 249 (4th Cir. 2003) 16

Nuxoll v. Indian Prairie Sch. Dist. No. 204,
523 F.3d 668 (7th Cir. 2008) 20, 21

Palmer v. Waxahachie Indep. Sch. Dist.,
579 F.3d 502 (5th Cir. 2009) 19

Ponce v. Socorro Indep. Sch. Dist.,
508 F.3d 765 (5th Cir. 2007) 12

Porter v. Ascension Parish Sch. Bd.,
393 F.3d 608 (5th Cir. 2004). 19

Saxe v. State Coll. Area Sch. Dist.,
240 F.3d 200 (3d Cir. 2001) 16

Schenck v. Pro-Choice Network,
519 U.S. 357 (1997) 23

Texas v. Johnson,
491 U.S. 397 (1989) 23

Tinker v. Des Moines
Indep. Community Sch. Dist.,
393 U.S. 503 (1969) ..... passim

U.S. Term Limits, Inc. v. Thornton,
514 U.S. 779 (1995) 25

United States v. O'Brien,
391 U.S. 367 (1968) 1, 18, 19, 22

Virginia v. Black,
538 U.S. 343 (2003) 33

Walker-Serrano v. Leonard,
325 F.3d 412 (3d Cir. 2003) 17

West Virginia State Bd. of Educ. v. Barnette,
319 U.S. 624 (1943) 29, 32

Statutes

28 U.S.C. § 1254(1) 3

Other Authorities

Douglas Laycock,
Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers,
81 NW. U. L. REV. 1 (1986) 29

Jay A. Sekulow et al.,
Proposed Guidelines for Student Religious Speech and Observance in Public Schools,
46 MERCER L. REV. 1017 (1995). 26

Jeremiah Galus,
Note, *Bong Hits 4 Jesus: Student Speech and the 'Educational Mission' Argument After Morse v. Frederick*,
71 U. PITT. L. REV. 143 (2009)..... 21

R. George Wright,
Doubtful Threats and the Limits of Student Speech Rights,
42 U.C. DAVIS. L. REV. 679 (2009)..... 21

PETITION FOR A WRIT OF CERTIORARI

This petition presents the Court with an opportunity to reaffirm the continuing vitality of its student speech jurisprudence, anchored by its landmark decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). In *Tinker*, and in subsequent cases refining that decision, the Court has struck a careful balance between, on the one hand, students' "undoubted" right "to advocate unpopular and controversial views in schools," *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986), and, on the other, the need for school officials to restrict student speech given the "special characteristics of the school environment." *Tinker*, 393 U. S. at 506. In balancing these competing considerations, the Court has held that, unless speech is lewd, vulgar, school-sponsored, or drug-promoting, *Tinker* provides the general rule: *i.e.*, student expression may not be suppressed unless school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school." *Id.* at 513; *see also Morse v. Frederick*, 551 U.S. 393, 422–23 (2007) (Alito, J., concurring).

The Fifth Circuit's decision below jettisons that standard and, instead, borrows the less exacting "intermediate scrutiny" standard from *United States v. O'Brien*, 391 U.S. 367 (1968), ordinarily used to assess restrictions on expressive conduct resulting in only "incidental limitations on First Amendment freedoms." *Id.* at 376. The Fifth Circuit held that, even when a school district policy targets pure student speech, a lower standard of

scrutiny is appropriate as long as the policy is facially content- and viewpoint-neutral. But *Tinker* already provides a test tailored to the time and place of the school setting. Lowering the standard of review further for neutral time, place, and manner restrictions in the school setting amounts to impermissible double counting that dilutes the First Amendment's protections.

In this case, the effect of that diluted standard of review was dramatic: the school district did not even attempt to defend its draconian student speech policy under *Tinker*. Yet the court of appeals blessed the policy, permitting the school district to impose sweeping restrictions on pure student speech. Moreover, the dispute over the standard of review is cleanly presented in this case. The district court recognized the importance of the standard of review to the resolution of this case and certified the issue to the Fifth Circuit. The Fifth Circuit then decided the issue in a way that deviates from this Court's precedents and radically under-protects student speech. The Court's intervention is needed to correct the Fifth Circuit's improper doctrinal departures, including its decision to discard constitutional principles that have long grounded the Court's student speech jurisprudence.

Apart from contravening this Court's precedents, the Fifth Circuit's decision also further deepens an existing and well-recognized conflict within the courts of appeals on a recurring issue of practical and constitutional importance—namely, the proper standard to apply when a school imposes

restrictions on pure student speech that are facially content- and viewpoint-neutral. The Court's guidance is needed to restore clarity to this unsettled area of law.

OPINIONS BELOW

The court of appeals' decision is reported at 589 F.3d 740 and reproduced in the Appendix at App. 1. The court of appeals' unpublished order denying rehearing and rehearing *en banc* is reproduced at App. 15. The decision of the United States District Court for the Eastern District of Texas does not appear in the official reports but is available at 2007 WL 654308 and is reproduced at App. 17.

JURISDICTION

The court of appeals rendered its decision on December 1, 2009. App. 1. It denied petitioners' timely petition for rehearing and rehearing *en banc* on January 5, 2010. App. 15. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law ... abridging the freedom of speech, or of the press ...." U.S. CONST. amend. I.

STATEMENT OF THE CASE

This case involves a northern Texas school district that has attempted to banish religious expression from school. The school district has adopted a series of student speech policies that purport to prohibit virtually all non-verbal student speech in any school-related context, and have been used by school officials to root out religious speech. School officials have never justified their sweeping restrictions on student speech as necessary to avoid substantial disruptions to school operations. Instead, they persuaded the court below that the all-encompassing nature of their speech suppression is a constitutional virtue that lowers the level of scrutiny and obviates the need to justify the policy as necessary to avoid substantial disruption.

A. The Initial Student Speech Policy

1. Respondent Plano Independent School District ("PISD") has long maintained a student speech policy, entitled *Student Expression: Distribution of Nonschool Literature*, that gives school officials broad authority to restrict virtually any and all forms of non-verbal student speech. Until April 2005—after petitioners filed this lawsuit—the PISD policy broadly restricted students' distribution of any "written material, tapes, or other media." Among other things, the policy (i) required that all students submit any written materials they wished to distribute to the school principal for prior review and approval; (ii) banned the distribution of any material in classrooms and hallways; and (iii) provided that

materials could be distributed only at a school-designated area subject to further time, place, and manner restrictions. App. 95. When PISD formally adopted the policy in October 2003, the PISD Board of Trustees did not consider or offer any evidence concerning the need for the policy.

2. Although the policy purported to impose a broad ban on distributing any kind of written material, in practice, the speech code was used by PISD officials to promote an anti-religious orthodoxy and to root out any and all student religious speech. In particular, PISD officials applied the *Student Expression* policy to prohibit students from distributing materials with religious messages, while at the same time permitting students to distribute materials containing non-religious messages.

For example, in December 2001, as part of a school-sponsored winter break party where students were allowed to exchange gifts, first-grader Michaela Wade brought goodie bags containing candy canes and pencils to give to her classmates. *See* Second Am. Compl. ¶ 6.71. Michaela's teacher asked Michaela whether the bags contained anything "religious" and, upon inspecting the bags, confiscated the pencils because they were inscribed with the message "Jesus is the reason for the season." Second Am. Compl. ¶¶ 6.77-6.79. The school principal later instructed Michaela's mother that, under PISD policy, the candy canes were permissible gifts but the "religious" pencils were not. Second Am. Compl. ¶ 6.100.

In December 2003, third-grader Jonathan Morgan wished to give his classmates goodie bags containing pens shaped as candy canes at another winter break party where students were allowed to exchange gifts. Each pen was affixed to a card, entitled "Legend of the Candy Cane," containing a poem about the Christian origin of candy canes. App. 65. A few weeks before the party, Jonathan's parents met with PISD officials and asked about the school's policy prohibiting students from exchanging religious gifts and from writing "Merry Christmas" on personalized student-made holiday cards sent to military troops and nursing homes. At the meeting, the principal confirmed that a PISD policy approved at the "highest level" barred students from including religious messages in their goodie bags and from using the word "Christmas." App. 66. On the day of the party, Jonathan's teacher stopped Jonathan from bringing his goodie bags into the classroom because they contained "religious" messages. Other students whose goodie bags did not contain religious messages were allowed to distribute their gifts regardless of what message those gifts may have conveyed. App. 67.

In January 2004, fifth-grader Stephanie Versher held a "half-birthday" party at school—a customary practice for PISD students whose birthdays fall within the summer months. App. 70. PISD students celebrating half-birthdays typically distribute snacks and gifts to other students, which have included items such as bookmarks, key rings, bracelets, and pencils. App. 70. Stephanie wished to give each classmate a brownie and two pencils, one inscribed with the word "moon," and one with

"Jesus loves me this I know for the Bible tells me so." App. 71. On the day of the party, a school official handed Stephanie's mother a letter stating that she was improperly distributing material to students on school property. App. 71. The letter warned that, if Stephanie's mother failed to submit the materials to the principal for prior review, or failed to leave school grounds when requested, the school would call the police. App. 71. The principal further explained to Stephanie's mother that her fifth-grader was distributing objectionable "religious" material with a message with which other students might disagree. App. 72. The principal instructed that Stephanie could distribute the brownies and "moon" pencils, but not the pencils that mentioned "Jesus." App. 72. After school, when Stephanie was giving pencils mentioning "Jesus" to friends on the school lawn, the principal grabbed her, confiscated a pencil she had given a classmate, and informed her that it was impermissible to distribute pencils with religious messages on school property. App. 73. School officials then warned Stephanie's mother that Stephanie could be expelled if she again tried to distribute materials to her friends at school if the materials included a religious message. App. 73.

3. On other occasions, PISD officials employed the *Student Expression* policy to prohibit students from discussing "religious" events or distributing free tickets to those events. In April 2003, for example, second-grader Kevin Shell wanted to tell his school friends about free tickets to his church's Easter sunrise service. App. 62. Kevin's teacher consulted the principal, who explained that PISD

policy prohibited "religious" tickets from being discussed or distributed on school property. App. 62-63. The following month, Kevin was again told that he could not mention or distribute free tickets to a spring musical at his church. A school official informed Kevin's mother that PISD policy prohibited elementary students from discussing or distributing materials expressing a religious viewpoint. App. 64. In January 2004, Kevin's mother asked the school official and the principal about the possibility of offering her son's friends free tickets to a church rally. App. 69. The principal stated that her son could not mention or distribute tickets to any religious event.

In January 2004, fifth-grader Stephanie Versher wished to give her friends free tickets to a Christian drama. Outside of class, Stephanie offered tickets to a few friends who had expressed an interest in attending. App. 69-70. Stephanie's teacher, after consulting with the principal, threw away the tickets and prohibited Stephanie from giving away any more tickets to religious events. App. 70.

B. The Amended Student Speech Policy

1. On December 15, 2004, petitioners—four families whose children are (or were) students at PISD public schools and were prohibited from distributing materials deemed "religious"—filed suit against PISD and two PISD school principals, Lynn Swanson and Jackie Bomchill, in the District Court for the Eastern District of Texas. Complaining that school officials were impermissibly restricting speech and

discriminating against religious views, the petitioners requested a temporary restraining order, preliminary and permanent injunctive relief, declaratory judgment, nominal damages, and attorney's fees. App. 33. On December 16, 2004, the district court issued a temporary restraining order prohibiting PISD, Swanson, and Bomchill from "interfering with or prohibiting Plaintiffs and other students from distributing religious viewpoint gifts to classmates at the December 17, 2004 'winter break' parties." App. 33. The court's order also prohibited the PISD officials from causing students to feel embarrassed, uncomfortable, or fearful for exercising their legal rights, and enjoined the school officials from engaging in any further First Amendment violations. App. 33.

2. Four months after petitioners filed their lawsuit, PISD amended its student speech policy. The amended version of PISD's *Student Expression: Distribution of Nonschool Literature* broadly bans students from distributing "materials" in "classrooms" during "school hours." App. 98. The policy defines "materials" expansively to include any "writings, items, objects, articles or other materials." App. 98. It also defines "classrooms" broadly as "any location designated for providing and/or facilitating: student instruction; student education; achievement of curricular objectives; achievement of state-mandated learning requirements; school-sponsored extracurricular activities; and/or school-sponsored programming for students." App. 98. The policy explains that students are prohibited from distributing materials

not only in "traditional classrooms," but also in "school campus gymnasiums, auditoriums, cafeterias, hallways, and outdoor facilities." App. 98. Finally, the policy defines "school hours" to include not just the school day but any time "when students are receiving educational instruction, participating in or attending extracurricular activities, or otherwise being involved in educational/curricular programming." App. 98.

The amended policy modifies some of the restrictions included in the earlier policy. First, it eliminates the requirement that students submit materials to the principal for pre-approval. Second, it allows all students to distribute materials "30 minutes before school and 30 minutes after school hours" at school entrances, exits, and any principal-designated "gathering areas," and permits elementary students to distribute materials during designated recess periods. Third, it allows middle and secondary students—but not elementary students—to distribute materials in hallways and cafeterias. *See* App. 99, 103.

3. In November 2005, after petitioners moved for summary judgment on their facial challenge to the constitutionality of both the initial and amended PISD student speech policies, PISD held a public hearing at which PISD officials offered "additional evidence" in support of the amended policy. App. 37-38. At the end of the hearing, the Board of Trustees re-adopted the amended policy with no substantive alterations. It added, however, a preamble that "memorialized" PISD's reasons for the policy—purportedly, "to decrease distractions, to decrease disruption, to increase the time

available and dedicated to learning, and to improve the educational process, environment, safety and order at District schools and not invade or collide with the rights of others." App. 38, 106. The preamble also noted that the additional restrictions on elementary students were "intended to facilitate the safe, organized and structured movements of students between classes and at lunch, as well as to reduce littering." App. 110.

C. The Decisions Below

1. On February 26, 2007, the district court ruled on petitioners' motion for summary judgment on their facial challenge to the constitutionality of both the initial and amended PISD policies, as well as PISD's cross-motion for summary judgment. App. 17. With respect to PISD's initial policy, the district court—accepting the recommendation of a magistrate—found that petitioners' challenge was moot. App. 19. With respect to PISD's amended policy, the district court agreed with the magistrate that, because the restrictions were viewpoint-neutral, the Fifth Circuit's decision in *Canady v. Bossier Parish School Board*, 240 F.3d 437 (5th Cir. 2001), compelled applying the standard for evaluating "time, place, and manner restrictions" on expressive conduct. App. 18. Under that standard, the district court upheld all of PISD's restrictions on student speech as facially constitutional, except one: the district court found that the categorical bar on elementary students from distributing materials in the cafeteria was overbroad. App. 19.

After the district court issued its ruling, this Court released its decision in *Morse* and the Fifth Circuit held that Justice Alito's concurring opinion was controlling. *See Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 768 (5th Cir. 2007). In the wake of these developments, the district court certified its judgment resolving the facial challenges to both PISD policies as final and appealable under Rule 54(b) of the Federal Rules of Civil Procedure. App. 21. Explaining that the as-applied challenges to the PISD policies posed distinct legal questions, the district court deemed it appropriate for the Fifth Circuit to clarify the legal standard for evaluating the constitutionality of restrictions on student speech. App. 22. The district court concluded that, to further "the interest of avoiding unnecessary time and expense and the unnecessary expenditure of ... scarce judicial resources," it was appropriate for its "resolution of the distinct legal question regarding the facial constitutionality of the school district policies" to be presented to the Fifth Circuit "for resolution and decision." App. 22.

2. On December 1, 2009, the U.S. Court of Appeals for the Fifth Circuit affirmed in part and reversed in part. App. 1. The Fifth Circuit disagreed that the facial challenge to the initial policy was moot, recognizing that petitioners sought nominal damages in addition to injunctive and declaratory relief. The Fifth Circuit remanded all claims addressing the initial policy to the district court for further proceedings.

Addressing the facial constitutionality of PISD's amended policy, the Fifth Circuit agreed

with the district court that *Tinker*—which requires that student expression must "materially and substantially disrupt the work and discipline of the school" to be suppressed—did not supply the relevant legal standard. Instead, the Fifth Circuit determined that, under its precedent in *Canady*, "intermediate scrutiny" was appropriate to determine whether content- and viewpoint-neutral restrictions on student speech comport with the First Amendment. Applying that less demanding standard of review, the Fifth Circuit upheld all of PISD's restrictions on student speech as constitutional, including the categorical ban prohibiting elementary students from distributing materials in the cafeteria (which the district court had declared overbroad). In the Fifth Circuit's view, because PISD's amended policy restrictions do not target particular content or viewpoints, it was "of no moment" that PISD policy restricted "pure speech." App. 9.

On January 5, 2010, the court of appeals denied rehearing and rehearing *en banc*. App. 15. This petition follows.

REASONS FOR GRANTING THE PETITION

This petition provides an important opportunity to reaffirm the centrality of *Tinker* to the Court's student speech jurisprudence. The decision below dilutes the First Amendment rights of students by borrowing an inapposite test and ignoring the Court's own doctrine specifically directed to speech restrictions addressed to the "time" and "place" of the school setting. In addition, this case presents a uniquely clean

vehicle to address the standard of review: the legal issue was certified below and viewed by all as critical to the outcome of the entire case. This Court has long held that First Amendment rights do not stop at the schoolhouse gate. This case presents an opportunity to make that promise a reality by reaffirming that the *Tinker* test applies to restrictions on student speech.

Three factors underscore the case for *certiorari* here. *First*, the Fifth Circuit's decision deepens a well-recognized split in authority among the lower courts over the proper standard to apply when evaluating the constitutionality of content- and viewpoint-neutral restrictions on student speech. *Second*, the Fifth Circuit's decision cannot be squared with fundamental principles of First Amendment law that have undergirded this Court's student speech jurisprudence. *Third*, the question presented addresses an important, recurring issue. If left uncorrected, the decision below threatens to wipe out any meaningful limits on school officials' ability to restrict student speech, and greatly increases the risk that school officials will employ student speech codes as a means of suppressing disfavored views on issues of religion, politics, and other matters of public opinion.

I. The Courts of Appeals Are Sharply Divided Over Whether *Tinker* Applies To Content- And Viewpoint-Neutral Restrictions On Student Speech.

The decision below exacerbates a clear and well-recognized circuit split over the proper scope of *Tinker*. In particular, there is a clear and acknowledged split of authority concerning whether

the *Tinker* standard generally governs the constitutionality of school policies that restrict student speech or whether that standard applies narrowly only to content- and viewpoint-based policies.

1. Over four decades ago, this Court held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. at 506. In *Tinker*, school officials adopted a facially viewpoint-neutral policy prohibiting students from wearing arm bands at school and, applying that policy, punished high school students for wearing black armbands in protest of the Vietnam War—a political statement that the Court deemed "akin to 'pure speech.'" *Id.* at 505. Evaluating whether school officials had violated the First Amendment, *Tinker* set out the standard directed to the unique context of student speech in school: "student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'" *Morse*, 551 U.S. at 403 (quoting *Tinker*, 393 U.S. at 513). Applying that standard, the Court emphasized that wearing a black armband was "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance," and concluded that the school had violated the students' First Amendment rights. *Tinker*, 393 U.S. at 508.

In three subsequent student speech cases, the Court has elaborated on *Tinker*'s "substantial disruption" rule. In *Bethel School District No. 403*

v. Fraser, 478 U.S. 675 (1986), the Court indicated that schools may categorically suppress "lewd" or "vulgar" student speech. *Id.* at 685. In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the Court gave schools greater leeway in addressing school-sponsored speech, allowing restrictions "reasonably related to legitimate pedagogical concerns" when student speech is sponsored by the school. *Id.* at 273. And, most recently, in *Morse v. Frederick*, 551 U.S. 393, the Court determined that schools may restrict student speech that is reasonably viewed as promoting illegal drug use. All three cases have treated the school context as unique and treated *Tinker* as stating the general rule for student speech.

2. Against this precedential backdrop, the Second, Third, Fourth, and Eighth Circuits have held that, outside the special categories of lewd or vulgar, school-sponsored, and drug-promoting speech, *Tinker* sets forth a *general rule* for assessing the constitutionality of restrictions on student speech. *See Lowry v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 761 (8th Cir. 2008); *Guiles v. Marineau*, 461 F.3d 320, 325 (2d Cir. 2006); *Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249 (4th Cir. 2003); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001). As then-Judge Alito explained in a 2001 Third Circuit decision, "[s]peech falling outside" of the narrow exceptions recognized in *Fraser* and *Hazelwood* (and now *Morse*) "is subject to *Tinker*'s general rule" and "may be regulated only if it would substantially disrupt school operations or interfere with the right of others." *Saxe*, 240 F.3d at 214

(Alito, J.); *see also Guiles*, 461 F.3d at 325 ("for all other speech ... the rule of *Tinker* applies").

These courts view the "substantial disruption" standard as applicable to *all* student speech (so long as it is not lewd or vulgar, school-sponsored, or drug-promoting), regardless whether the restrictions are content- or viewpoint-neutral. In *Guiles v. Marineau*, for example, the Second Circuit concluded that, although *Tinker*'s facts involved school officials who were discriminating against political viewpoints, there was no reason to limit the "substantial disruption" standard to viewpoint-based restrictions on speech. 461 F.3d at 326. Instead, noting that *Tinker* is "generally applicable to student-speech cases," the Second Circuit applied the "substantial disruption" test to determine whether a school's viewpoint-neutral application of its dress code to prohibit a student from wearing an anti-war T-shirt ran afoul of the First Amendment. *Id.* at 326, 330. Other courts of appeals have employed similar reasoning in applying *Tinker* when evaluating the constitutionality of content- and viewpoint-neutral restrictions on student speech. *See Holloman v. Harland*, 370 F.3d 1252, 1276 (11th Cir. 2004) (applying *Tinker* even though student "was punished" for the viewpoint-neutral reason of "disobeying directions"); *Walker-Serrano v. Leonard*, 325 F.3d 412, 416 (3d Cir. 2003) (applying *Tinker* even though school's materials-distribution policy was content- and viewpoint-neutral).

3. In stark contrast, the Fifth, Sixth, and Ninth Circuits have held that *Tinker* is irrelevant

in most student speech cases. Instead, they have narrowly interpreted *Tinker* as setting out a heightened standard that applies only in the limited context where school officials seek to restrict student speech because of its content or viewpoint. In contrast, in the vast majority of cases when student speech restrictions can be characterized as content- and viewpoint-neutral, these courts have applied the intermediate scrutiny standard of *United States v. O'Brien*, 391 U.S. 367 (1968). That standard has traditionally been used to evaluate time, place, and manner restrictions on expressive conduct that, unlike student speech codes, have only an incidental effect on First Amendment freedoms.

The Fifth Circuit's decision in *Canady v. Bossier Parish School Board*, 240 F.3d 437 (5th Cir. 2001), is the fountainhead of this misguided line of cases. In *Canady*, the Fifth Circuit concluded for the first time that "[a]pplying the *Tinker* analysis to all other restrictions on student speech does not account for regulations that are completely viewpoint-neutral." *Id.* at 443. Although it acknowledged that "several circuits" had applied *Tinker* to cases beyond the "viewpoint-specific category," the court chose to depart from its sister circuits and apply *O'Brien*. Under *O'Brien*, a content- or viewpoint-neutral restriction on expressive conduct will be sustained under the First Amendment if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is

no greater than essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. The rule adopted in *Canady* has been consistently applied in the Fifth Circuit to cases involving restrictions on student speech. *See Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502 (5th Cir. 2009); *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 (5th Cir. 2004).

The Fifth Circuit's novel approach to content- and viewpoint-neutral restrictions on student speech has since spread to the Sixth and Ninth Circuits. Although both circuits at one time approached *Tinker* as a general rule applicable to all student speech, *see Barr v. Lafon*, 538 F.3d 554, 563-64 (6th Cir. 2008); *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992), in more recent cases the Sixth and Ninth Circuits have aligned themselves with the Fifth Circuit's position.

In *M.A.L. v. Kinsland*, 543 F.3d 841 (6th Cir. 2008), for example, the Sixth Circuit held that a school district was "entitled to put time, place, and manner restrictions on hallway speech so long as the restrictions are viewpoint neutral and reasonable in light of the school's interest." *Id.* at 847; *see also Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 391 (6th Cir. 2005) (applying *O'Brien* and rejecting *Tinker* in challenge to school dress code). Citing the Fifth Circuit's *Canady* decision, the Sixth Circuit distinguished *Tinker* as a case about efforts "to silence the student because of the particular viewpoint he expressed," and concluded that the school district "certainly need not satisfy

this demanding standard merely to impose a viewpoint-neutral regulation." *M.A.L.*, 543 F.3d at 849-50 & n.4. Similarly, in its divided opinion in *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419 (9th Cir. 2008), the Ninth Circuit applied *O'Brien* to conclude that a school dress code comported with the First Amendment. Over a strongly worded dissent from Judge Thomas, the panel majority concluded that "applying intermediate scrutiny to school policies that effect content-neutral restrictions upon pure speech or place limitations upon expressive conduct ... strikes the correct balance between students' expressive rights and schools' interests in furthering their educational missions." *Id.* at 434; *cf. id.* at 442-43 (Thomas, J., dissenting).

3. Further confirming that the law in this area is unsettled, the Seventh Circuit appears to have taken a third path and adopted something of a hybrid approach. In *Nuxoll v. Indian Prairie School District No. 204*, 523 F.3d 668 (7th Cir. 2008), Judge Posner writing for the panel majority distinguished *Tinker* as a case about "discriminating against a particular point of view." *Id.* at 673. When the restriction is viewpoint-neutral, Judge Posner reasoned, the school need not prove that the speech it wants to suppress "would materially and substantially disrupt the work and discipline of the school." *Id.* The Seventh Circuit nonetheless applied a variant of the "substantial disruption" test—albeit a less demanding one—to the viewpoint-neutral restriction on student speech. *See id.* Concurring in the judgment, Judge Rovner criticized the panel

majority's "convoluted" distinction of *Tinker* as a case limited to viewpoint discrimination, and asserted that *Tinker*'s "substantial disruption" test "straight-forwardly" applied. *Cf. id.* at 676 (Rovner, J., concurring).

4. This split in authority is deep-seated and real. It is one that both courts and commentators have long and widely recognized as a source of serious division and ongoing confusion among the courts of appeals. *See Guiles*, 461 F.3d at 326 (acknowledging "lack of clarity in the Supreme Court's student-speech cases" over the proper standard); *Canady*, 240 F.3d at 443 (acknowledging circuit split). As commentators have explained, "[w]hether *Tinker* should be read to apply to not only viewpoint- or content-based regulations, but also to content-neutral regulations of speech is unclear" because "the circuit courts are currently divided." R. George Wright, *Doubtful Threats and the Limits of Student Speech Rights*, 42 U.C. DAVIS. L. REV. 679, 712-13 (2009); Jeremiah Galus, Note, *Bong Hits 4 Jesus: Student Speech and the 'Educational Mission' Argument After Morse v. Frederick*, 71 U. PITT. L. REV. 143, 159 (2009) (the "debate continues over whether *Tinker*'s general rule applies to all student speech ... or to student speech that is subject to content-based regulations").

II. The Decision Below Cannot Be Reconciled With This Court's Student Speech Jurisprudence.

The decision below not only conflicts with decisions from other courts of appeals, but also

contravenes fundamental principles recognized in this Court's student speech jurisprudence. In failing to apply *Tinker*'s "substantial disruption" standard, the Fifth Circuit adopted a new analytical framework for evaluating restrictions on student speech that relies on an expansive interpretation of *O'Brien*, and essentially reduces *Tinker* to a narrow exception, rather than the general rule governing student speech cases.

A. The Fifth Circuit Misapplied *O'Brien*.

The Fifth Circuit's decision conflicts with this Court's statements that intermediate scrutiny does not apply where, as here, a government official seeks to regulate *pure speech* as opposed to regulating conduct that has an expressive component. The lower court's decision to apply *O'Brien* in a context where government-imposed regulations target pure student speech thus represents a significant departure from precedent.

1. In *O'Brien*, this Court carefully distinguished between government regulations that target pure speech and those addressing conduct. Expressive conduct, such as draft-card burning, the Court explained, is not entitled to the full panoply of First Amendment protections. Instead, "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in *regulating the nonspeech element* can justify *incidental limitations* on First Amendment freedoms." *O'Brien*, 391 U.S. at 376 (emphases added); *see also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567 (1991) (holding that a statute barring nude dancing was "justified despite

its incidental limitations on some expressive activity").

The Court has thus "limited the applicability of *O'Brien*'s relatively lenient standard to those cases in which" the "governmental interest" is "unconnected to expression" and "unrelated to the suppression of free expression.'" *Texas v. Johnson*, 491 U.S. 397, 407 (1989) (citation omitted). In such circumstances, the risk of impinging on First Amendment freedoms is diminished because the government is seeking to regulate the "nonspeech element" of the conduct and is only "incidentally" infringing on the "speech element." *Id.*

2. It is therefore significant that PISD's student speech policy—which is tellingly entitled *Student Expression*—is not "unconnected to expression." *Id.* To the contrary, it is all about expression. Its sweeping limitations on the distribution of any written material are directly, not just incidentally, designed to suppress pure student speech. *See Bartnicki v. Vopper*, 532 U.S. 514, 427 (2001) ("the delivery of a handbill or a pamphlet ... is the kind of 'speech' that the First Amendment protects"); *Schenck v. Pro-Choice Network*, 519 U.S. 357, 377 (1997) ("[l]eafletting and commenting on matters on public concern are classic forms of speech that lie at the heart of the First Amendment"); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995) (statute prohibiting distribution of campaign literature is "a regulation of pure speech"); *Bigelow v. Virginia*, 421 U.S. 809, 817 (1975) (circulating a publication encouraging abortion is "pure speech"). Accordingly, because PISD officials are not seeking

to regulate the non-speech element of student conduct, but rather targeting speech itself, *O'Brien* is completely out of place.

B. The Fifth Circuit Misinterpreted *Tinker*.

The Fifth Circuit also failed to give appropriate weight to this Court's decisions specifically addressing restrictions on speech in the school context. In particular, in declining to apply *Tinker*'s "substantial disruption" standard, the Fifth Circuit placed heavy reliance on the fact that *Tinker* involved what some courts have since characterized as a viewpoint-based restriction on student speech. But cabining *Tinker* to its precise facts cannot be reconciled with this Court's subsequent precedents.

1. Although *Tinker* did not explicitly spell out its applicability to content- and viewpoint-neutral regulations, those "terms of art had not yet been used by the Supreme Court when *Tinker* was decided in 1969." *Jacobs*, 526 F.3d at 430. *Tinker*'s general applicability is nonetheless implicit in the Court's decision. In *Tinker*, school officials adopted a facially viewpoint-neutral policy that banned students from wearing any armband no matter what message the armband may have conveyed. That the policy was facially viewpoint-neutral, however, made no difference to the Court's decision. The students' free speech rights were entitled to protection even though an ad hoc reaction to anti-war armbands had been converted to a general no-armband policy. Indeed, if students' First Amendment protections were contingent on

whether the restrictions were content- and viewpoint-neutral, that would as a practical matter nullify the protections that *Tinker* recognized. The armbands in *Tinker*—which this Court has described as "[p]olitical speech ... 'at the core of what the First Amendment is designed to protect,'" 551 U.S. at 403—could be banned so long as the restriction purported to be content- and viewpoint-neutral. Likewise, the "undifferentiated fear or apprehension of disturbance" that *Tinker* deemed an impermissible basis for restricting speech, 393 U.S. at 508, could become a permissible basis for restricting speech, as long as the school district adopted a policy that is content- and viewpoint-neutral on its face. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995) (the "Constitution 'nullifies sophisticated as well as simple-minded modes' of infringing on constitutional protections") (citation omitted).

In any event, in a case decided just three years after *Tinker*—*Grayned v. City of Rockford*, 408 U.S. 104 (1972)—this Court relied on *Tinker*'s "substantial disruption" test to uphold a content- and viewpoint-neutral city ordinance prohibiting noises or diversions that tended to disturb the peace or good order of the school. Declaring *Tinker* the "touchstone" for "how to accommodate First Amendment rights with the 'special characteristics of the school environment,'" *id.* at 117 (quoting *Tinker*, 393 U.S. at 506), the Court directly analogized the speech rights of citizens *near* a school to those of students *within* a school: "in each case, expressive activity may be prohibited if it 'materially disrupts classwork or involves

substantial disorder or invasion of the rights of others.'" *Id.* at 118 (quoting *Tinker*, 393 U.S. at 513). Because the ordinance suppressed only speech that was disrupting or was about to disrupt school activities, the Court deemed the regulation consistent with the First Amendment. *Id.* at 119.

Taken together, *Tinker* and *Grayned* "teach that even when analyzing content-neutral time, place, and manner restrictions on student speech in public schools, the proper approach is to examine the restriction to determine if it furthers the purpose of preventing material and substantial disruption of the school's work and discipline." Jay Alan Sekulow et al., *Proposed Guidelines for Student Religious Speech and Observance in Public Schools*, 46 MERCER L. REV. 1017, 1037 (1995).

2. This Court's more recent student speech precedents likewise confirm that the Fifth Circuit's approach is misguided. Those precedents make clear that—unless speech falls within the special categories recognized in *Fraser*, *Hazelwood*, and *Morse*—*Tinker* applies, regardless whether the restriction on speech is content-based or content-neutral, viewpoint-based or viewpoint-neutral. *See, e.g.*, *Hazelwood*, 484 U.S. at 270-73 (*Tinker* is the test "for determining when a school may punish student expression"). Justice Alito's opinion in *Morse*, which offered the narrowest grounds for the majority's decision and is therefore controlling, *see Marks v. United States*, 430 U. S. 188, 193 (1977), unequivocally clarified that no restrictions on student speech beyond those in *Tinker*, *Fraser*, *Hazelwood*, and *Morse*, are permissible:

> I do not read the opinion to mean that there are necessarily any grounds for [student speech] regulation that *are not already recognized in the holdings of this Court*. In addition to *Tinker*, the decision in the present case allows the restriction of speech advocating illegal drug use; ... *Fraser* .... permits the regulation of speech that is delivered in a lewd or vulgar manner as part of a middle school program; and *Hazelwood* ... allows a school to regulate what is in essence the school's own speech .... I join the opinion of the Court on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify *any other speech restrictions*.

Morse, 551 U.S. at 422-23 (Alito, J., concurring) (emphases added).

By refusing to apply *Tinker* to PISD's strict student speech policy, the Fifth Circuit has in effect justified restrictions on student speech not recognized in this Court's precedents. Indeed, its self-described recognition of a *fifth* (and by far the largest) category of student speech regulations—on top of *Tinker*, *Fraser*, *Hazelwood*, and *Morse*—directly contravenes this Court's instructions in *Morse*. *See* App. 6.

C. The Fifth Circuit Undervalued Student Speech.

Finally, the Fifth Circuit's decision is at odds with this Court's precedents because it fails to take

into account the special features of the school environment. Those features require protecting the educational prerogatives of school officials when student speech is lewd or vulgar, school-sponsored, or drug-promoting. But beyond that, the school environment does not justify speech codes that limit First Amendment rights unless the targeted speech can be reasonably expected to substantially disrupt school operations. This sensible rule allows schools to do their jobs while safeguarding students' rights to hold diverse views and to be free from the impositions of an official orthodoxy. *See Jacobs*, 526 F.3d at 434 (applying *Tinker* "strikes the correct balance between students' expressive rights and schools' interests in furthering their educational missions").

Rejecting this approach, the Fifth Circuit characterized *Tinker*'s "substantial disruption" standard as incompatible with the school's need to impose "time, place, and manner restrictions." App. 10. But that reasoning ignores *Tinker*'s own language. *Tinker's* "substantial disruption" standard affords school officials broad authority to impose reasonable time, place, and manner regulations on student speech: "conduct by the student, in class or out of it, which for any reason—whether it stems from *time, place, or type* of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Tinker*, 393 U.S. at 513 (emphasis added); *Grayned*, 408 U.S. at 117-18 ("[*Tinker*] nowhere suggested that students ... [have] an absolute constitutional

right to ... unlimited expressive purposes"). *Tinker* itself is a standard specifically tailored to the time and place of the school setting. To attempt to give greater deference to neutral time, place, and manner restrictions in that setting amounts to impermissible double counting. Thus, as *Tinker* itself makes clear, time, place, and manner restrictions in the school setting are constitutional precisely to the extent they comply with *Tinker* and its substantial disruption test.

The Fifth Circuit also neglected to consider the fact that *Tinker*'s standard protects impressionable young school children by ensuring that school officials do not abuse their power by employing sweeping speech bans as a cover for inculcating students in political, religious, or social orthodoxies. *See West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *see also Morse*, 551 U.S. at 423–25 (Alito, J., concurring). School officials entrusted with educating our nation's children should celebrate their students' diverse views, not seek to silence them. When student speech is not disruptive, courts must be vigilant to protect against restrictions on speech. *See* Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 48 (1986) ("*Tinker* thus protects the right to speak in the halls and on the school grounds—in all the students' free time when the school is not presenting its own messages."). This Court has recognized that even young students can differentiate between messages the state allows and messages the state endorses. *See Good News Club v. Milford Cent. Sch.*, 533 U.S.

98, 118 (2001); *Board of Educ. of Westside Cmty. Schs. (Dist. 66) v. Mergens*, 496 U.S. 226, 252 (1990) (plurality opinion). But students can only make that distinction if the school allows room for speech it does not control. As this Court has recognized, "state-operated schools may not be enclaves of totalitarianism" and student should not "be regarded as closed-circuit recipients of only that which the State chooses to communicate." *Tinker*, 393 U.S. at 511.

III. This Case Presents An Ideal Vehicle For Resolving An Important, Recurring Constitutional Issue.

The issue raised in this petition is important and recurring, and the Court is unlikely to find a better vehicle to address the issue.

1. The decision below presents a clean vehicle for addressing and resolving the legal question presented. Recognizing the importance of the issue, the district court certified its decision to the Fifth Circuit, which delivered a definitive ruling on the facial constitutionality of the amended PISD policy. In upholding PISD's student speech policy, the Fifth Circuit's adoption of one legal standard over the other—*O'Brien* over *Tinker*—proved outcome-determinative. Indeed, PISD did not even argue that PISD's sweeping restrictions on student speech satisfied *Tinker*'s "substantial disruption" test.

The stakes are particularly high here because petitioners' separate, pending challenges to the facial constitutionality of PISD's earlier student

speech policy and as-applied challenge to the constitutionality of both PISD policies are bound up in the decision below. The requirement to apply *O'Brien*, instead of *Tinker*, is now binding circuit precedent, and will govern those challenges as well. As those challenges move forward, PISD has indicated that it intends to take literally one hundred depositions and engage in other litigation maneuvers that will impose significant burdens on the few families that have spoken out against the school district's anti-religious orthodoxy and stood up for students' First Amendment rights. Resolving the issues posed in the petition will avoid expending judicial resources in litigating closely related matters under an erroneous constitutional standard.

2. More broadly, the Court's intervention is warranted to arrest what, under any reasonable measure, is a broad and improper grant of authority to school officials incompatible with our educational and constitutional traditions. The outcome of this case will affect the First Amendment rights of millions of students in school districts throughout the Fifth Circuit and beyond.

As this Court has long recognized, the "vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools." *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (citation omitted). Public education is "the very foundation of good citizenship." *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954). Accordingly, because "schools must teach by example the shared values of a

civilized social order" and "inculcate the habits and manners of civility," *Fraser*, 478 U.S. at 681, 683, the "scrupulous protection" of student liberties is important. *Barnette*, 319 U.S. at 637 (the fact that schools "are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms").

Substituting *O'Brien*'s less exacting intermediate scrutiny standard for *Tinker*'s "substantial disruption" test when schools are directly suppressing speech is inimical to the responsibility of schools to prepare students for lives of engaged citizenship. Rather than being taught to value the expression of diverse ideas, the lesson for PISD students is that non-disruptive student speech may nonetheless be suppressed under the vague and flimsy guise of advancing "a focused learning environment." App. 10; *cf. Morse*, 551 U.S. at 423 (Alito, J., concurring) (rejecting claim that schools may censor student speech that interferes with their "educational mission" because such an argument could "easily be manipulated in dangerous ways"). Indeed, the Fifth Circuit upheld a policy that controls speech in every respect—physical scope, temporal scope, and the scope of proscribable materials—and amounts to a draconian set of restrictions that signal that there are no meaningful limits on school officials' ability to restrict student speech.

Permitting schools to restrict speech also opens up the serious concern that schools will use blanket restrictions on speech to discriminate against disfavored views. In this case, for instance,

petitioners filed this lawsuit because PISD officials were singling out for suppression student speech that they deemed "religious"—confiscating, among other things, pencils bearing positive religious messages; candy canes affixed to poems noting the religious origins of candy canes; and free tickets to church events in which students were participating. It would be perverse if PISD could insulate its alleged violations of religious speech by simply pointing to the viewpoint-neutral language of its policy. Religious speech is "'at the core of what the First Amendment is designed to protect.'" *Morse*, 551 U.S. at 403 (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003)). But under the Fifth Circuit's approach, schools that wish to suppress particular viewpoints can still do just that—by passing sweeping speech bans that appear content- and viewpoint-neutral on their face. In short, *Tinker* would be reduced to a mere technicality to be circumvented through clever and ultimately more speech-restrictive policies.

CONCLUSION

For these reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
ASHLEY C. PARRISH
CANDICE CHIU
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
pclement@kslaw.com
(202) 737-0500

KELLY SHACKELFORD
HIRAM S. SASSER, III
JEFFREY C. MATEER
LIBERTY LEGAL INSTITUTE
2001 Plano Parkway, Ste. 1600
Plano, TX 75075
(972) 941-4444

Clyde Moody Siebman
SIEBMAN REYNOLDS BURG
& PHILLIPS LLP
300 N. Travis St.
Sherman, TX 75090
(903) 870-0070

WM. CHARLES BUNDREN
WM. CHARLES BUNDREN &
ASSOCIATES
2591 Dallas Parkway, Ste. 300
Frisco, TX 75034
(972) 624-5338

March 17, 2010 *Counsel for Petitioners*

APPENDIX

TABLE OF APPENDICES

Appendix A

Opinion of the United States Court of Appeals for the Fifth Circuit, dated Dec. 1, 2009 ..... App-1

Appendix B

Order of the United States Court of Appeals for the Fifth Circuit Denying Rehearing En Banc, dated Jan. 5, 2010 ..... App-15

Appendix C

Opinion of the United States District Court for the Eastern District of Texas, Sherman Division, dated Feb. 26, 2007 ..... App-17

Appendix D

Order of the United States District Court for the Eastern District of Texas, Sherman Division, Granting Motion to Certify Court Order as Final, dated June 30, 2008 ..... App-21

Appendix E

Opinion of the Magistrate Judge Denying Plaintiffs' Motion for Partial Summary Judgment (Facial Challenge to PISD Policies) and Granting Defendant Plano ISD's Cross Motion for Summary Judgment, dated Jan. 30, 2007 ..... App-24

Appendix F

Opinion of the Magistrate Judge Granting in Part and Denying in Part Individual Defendant's Motion to Dismiss Based on Qualified Immunity, dated Feb. 20, 2007 ..... App-60

Appendix G

Plano ISD Policy *Student Expression: Distribution of Nonschool Literature*, issued Oct. 20, 2003 ..... App-95

Plano ISD Policy *Student Expression: Distribution of Nonschool Literature*, issued April 4, 2005 ..... App-98

Preamble to Plano ISD Policy *Student Expression: Distribution of Nonschool Literature*, issued Nov. 1, 2005 ..... App-106

Appendix A

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 08-40707

Doug MORGAN; Robin Morgan; Jim Shell; Sunny Shell; Sherrie Versher; Christine Wade,
Plaintiffs-Appellants-Cross-Appellees,
v.
PLANO INDEPENDENT SCHOOL DISTRICT,
Defendant-Appellee-Cross-Appellant,
and
Lynn Swanson, in her individual capacity and as Principal of Thomas Elementary School; Jackie Bomchill, in her individual capacity and as Principal of Rasor Elementary School,
Defendants-Appellants.

Filed Dec. 1, 2009.

Before KING, HIGGINBOTHAM and CLEMENT, *Circuit Judges.*

OPINION OF THE COURT

PATRICK E. HIGGINBOTHAM, *Circuit Judge:*

This is a First Amendment challenge to the facial validity of school rules for student distribution of written materials.

I

Four families with students in Plano Independent School District schools allege that over a three-year period students were not permitted to distribute various religious materials, including pencils inscribed with "Jesus is the reason for the season," candy canes with cards describing their Christian origin, tickets to a church's religious musical programs, and tickets to a dramatic Christian play, this by a policy then in effect and captured by a 2004 version of the District rules. While this suit was pending, the District adopted a new policy, referred to as the 2005 Policy. It permits distribution of materials during: (1) 30 minutes before and after school; (2) three annual par-ties; (3) recess; and (4) school hours, but only passively at designated tables. Students are generally prohibited from distributing material at all other times and places.[1] In addition, middle and secondary school students are permitted to distribute materials in the hallways during non-instructional time and in the cafeterias during non-instructional time and designated lunch periods. The 2005 Policy also contained narrow limitations on the content of materials that may be distributed.[2]

---

[1] The 2004 Policy was more restrictive, requiring any materials to first be submitted for prior review by the principal.

[2] The Policy bans materials that (1) are obscene, vulgar, or otherwise age-inappropriate; (2) endorse actions endangering

At a public hearing the school board heard testimony from various employees regarding its necessity. Following this hearing, the District "re-adopted" the 2005 Policy, adding a preamble detailing its justifications for enacting it. The preamble states, in relevant part, that the Policy is "intended to decrease distractions, to decrease disruption, to increase the time available and dedicated to learning, and to improve the educational process, environment, safety and order at District schools and not invade or collide with the rights of others" and that the additional restrictions on elementary students are "intended to facilitate the safe, organized and structured movements of students between classes and at lunch, as well as to reduce littering."

II

With the new policy in effect, plaintiffs moved for a summary judgment that the policies are facially invalid. Accepting a magistrate judge's recommendation, the district court found the facial challenge to the 2004 Policy to be moot because no evidence suggested that the District would revert to a policy it had replaced with another. Turning to the facial validity of the 2005 Policy, the magistrate judge, relying on *Canady v. Bossier Parish School*

---

the health or safety of students; (3) advocate violation of school rules; (4) advocate imminent lawlessness; (5) contain hate speech; and (6) reasonably could result in "material and substantial interference with any school education and/or curricular related activity or that block[ ] or impede[ ] the safe flow of traffic within hallways and entrance or exit ways of the school."

Board,[3] applied the *O'Brien* test for content and viewpoint neutral restrictions, concluding that it was narrowly tailored to achieve the significant governmental interest of "improving the educational process,"[4] while leaving open ample alternative channels of communication. The district court adopted the magistrate judge's report and recommendation except as it related to the provision in the 2005 Policy prohibiting distribution of materials during elementary school lunch periods. The district court concluded that "this provision reaches more broadly than is reasonably necessary to protect [the District's] legitimate interests."

Plaintiffs here challenge the finding of mootness and the finding that the 2005 Policy is facially valid.[5] The school district cross appeals the finding regarding the elementary school cafeteria policy. We

---

[3] 240 F.3d 437 (5th Cir. 2001) (applying to school uniforms the standard set forth in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)).

[4] *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 286 (5th Cir. 2001).

[5] The district court certified its judgment regarding the facial validity of both policies as final and appealable under Rule 54(b). The court found the facial and as-applied challenges to be distinct claims and that the facial challenges posed distinct legal questions. We acknowledge that there are different burdens attending an as-applied challenge, but note that regardless of our disposition of this matter, the plaintiffs will continue to litigate the constitutionality of the District's rules. While deferring to the judgment of the district court, we remain dubitante over the efficiency of separating the claims into separate appeals, an effort further complicated by the later denial of qualified immunity to individual defendants. The effort to confect an efficient appeal is commendable in concept although here perverse in execution.

conclude that the 2005 Policy is facially constitutional and hold that the challenge to the facial validity of the 2004 Policy is not moot. We will remand the claim of facial invalidity of the 2004 Policy so it can first be addressed by the district court with its resolution of the as-applied challenge to that policy, which is not before us.

Defendants Lynn Swanson and Jackie Bomchill, Principals at Thomas Elementary School and Rasor Elementary School, urge that the First Amendment does not apply to elementary school students. They and their argument are not before us. While this appeal was pending, the district court denied their separate motion to dismiss based on qualified immunity. That appeal is proceeding.[6]

III

We review a district court's judgment on cross motions for summary judgment de novo,[7] addressing each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party.[8] We will affirm only if there is no genuine issue of material fact and the party is entitled to prevail as a matter of law.[9]

---

[6] *Morgan v. Swanson*, No. 09-40373 (5th Cir. appeal docketed Apr. 7, 2009).

[7] *White Buffalo Ventures, LLC v. Univ. of Tex.*, 420 F.3d 366, 370 (5th Cir. 2005).

[8] *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 498 (5th Cir. 2001).

[9] *Shaw Constructors v. ICF Kaiser Eng'rs, Inc.*, 395 F.3d 533, 539 (5th Cir. 2004).

IV

The district court found the 2005 Policy to be facially valid under *United States v. O'Brien*,[10] rejecting plaintiffs' contention that the case is controlled by the standard of *Tinker v. Des Moines Independent School District*-that restrictions be "necessary to avoid material and substantial interference with schoolwork or discipline."[11]

We have made plain that "time, place, and manner" is the proper standard for evaluating content and viewpoint neutral regulations of student speech[12] and that when a school imposes content or viewpoint based restrictions the court will apply *Tinker*.[13] In *Canady v. Bossier Parish School Board*, we reaffirmed that there were four (arguably now five after *Morse*) categories of student speech and that "the level of scrutiny applied to regulations of student expression depends on the substance of the message, purpose of the regulation, and the manner in which the message is conveyed."[14] The first four categories are various content based designations drawn from the *Tinker*

---

[10] 391 U.S. at 367, 88 S.Ct. 1673.

[11] 393 U.S. 503, 511, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

[12] *Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 507-09 (5th Cir. 2009); *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 442-43 (applying the O'Brien standard and noting that it was "virtually the same standard[ ]" as the traditional time, place, and manner analysis).

[13] *Id.*

[14] *Id.* at 441-42.

line,[15] making essentially the same inquiry: whether, "in light of the special characteristics of the school environment,"[16] the school may impose content or viewpoint based regulations on student speech. The last category of restrictions, the one at issue in *Canady*, includes those that are content and viewpoint neutral.[17]

Canady viewed *O'Brien* as an application of the time, place, and manner standard.[18] The Supreme Court has recognized their virtual equivalence.[19] By this measure, a regulation must be content and viewpoint neutral, and must be "narrowly tailored

---

15 *Tinker*, 393 U.S. at 503, 89 S.Ct. 733;*Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) (holding schools may prohibit lewd, vulgar, obscene or plainly offensive student speech), *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (holding schools could regulate school sponsored speech such as student publications if "their actions are reasonably related to legitimate pedagogical concerns"); *Morse v. Frederick*, 551 U.S. 393, 422, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007) (Alito, J., concurring) (holding that schools may regulate speech "that a reasonable observer would interpret as advocating illegal drug use" and that could not be "interpreted as commenting on any political or social issue").

16 *Tinker*, 393 U.S. at 506, 89 S.Ct. 733.

17 *Canady*, 240 F.3d at 442-43. We recently reiterated the applicability of this standard to content and viewpoint neutral restrictions in Palmer, 579 F.3d at 507-09.

18 *Id.* (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)).

19 *Clark*, 468 U.S. at 298, 104 S.Ct. 3065 (stating that the test in *O'Brien* "in the last analysis is little, if any, different from the standard applied to time, place or manner, restrictions"); *Ward v. Rock Against Racism*, 491 U.S. 781, 798, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (reaffirming *Clark*).

to serve a significant government interest, and ... leave open ample alternative channels for communication of the information."[20] The regulation need not be the least restrictive alternative, but it must avoid burdening substantially more speech than is necessary to achieve the government's interest.[21]

Plaintiffs argue that the *O'Brien* standard only applies to expressive conduct and not to "pure speech"; that because distributing written materials is "pure speech," the *Tinker* "substantial disruption" test must apply. We are unpersuaded that the *O'Brien* standard, or a nigh-equivalent time, place, and manner standard, is so limited. The Supreme Court has twice applied the test we apply here to leafleting or distribution of written materials. In *Heffron v. International Society for Krishna Consciousness, Inc.*, the Court upheld a regulation preventing Hare Krishnas from distributing their literature at a state fair outside of specifically assigned booths.[22] The Court found that the state interest in orderly movements of the crowd was significant and that the regulation was narrowly tailored to meet that end. Likewise, in *Hill v. Colorado*, in evaluating a restriction on the distribution of handbills (as well as making oral statements and displaying placards) near health

---

20 *Ward*, 491 U.S. at 791, 109 S.Ct. 2746;see also *Hill v. Colorado*, 530 U.S. 703, 725-26, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000); *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-48, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981).

21 *Ward*, 491 U.S. at 790-91, 109 S.Ct. 2746.

22 452 U.S. at 654, 101 S.Ct. 2559.

care facilities, the Court asked whether the restrictions were "narrowly tailored to serve a significant government interest" and found them valid.[23] Both of these cases address regulation of what is urged here to be "pure speech." As we understand it, the logic of the argument would confine the time, place, and manner standard to regulations of "quintessential public forums" such as sidewalks;[24] requiring the state to clear the higher burden of a "substantial disruption" when regulating students. We must disagree. *Tinker* is triggered by content or viewpoint regulation. That "pure speech" is being regulated is here of no moment.

Morse v. Frederick is not contrary. Nor did Justice Alito's[25] observation that he did not understand the majority opinion "to mean that there are necessarily any grounds for such regulation that are not already recognized in the holdings of this court" mean that regulations of student speech could only be upheld if they met the strictures of *Tinker*, *Fraser*, *Hazelwood*, *Morse* and that no other First Amendment doctrine would apply. That contention cannot survive a plain reading. Its thrust is to cabin justifications of content or viewpoint based restrictions, reminding that reciting the mantra of a school's "educational mission" is insufficient. *Morse* did not involve, and

---

23 *Hill*, 530 U.S. at 710 & 713 n. 19, 120 S.Ct. 2480.

24 *Id.* at 715, 120 S.Ct. 2480.

25 We have held Justice Alito's concurrence to be the controlling opinion in *Morse*. *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 768 (5th Cir. 2007).

Justice Alito's writing did not address, content or viewpoint neutral restrictions.[26] The statement that "any argument for altering the usual free speech rules in the public schools ... [must] be based on some special characteristic of the school setting" implicitly recognizes that the generally applicable free speech rules (such as the allowance of time, place, and manner restrictions) continue to apply.

V

Applying the time, place, and manner test, we conclude that the District's 2005 Policy is reasonable and facially constitutional: the regulations at issue are content neutral[27] and the District has a significant legitimate interest that is furthered by the regulations. The regulations are aimed at providing a focused learning environment for its students.[28] The regulation of speech during and immediately before the classroom instructional period is intended to facilitate the beginning of class without a wait for the distribution of materials. Similarly, restrictions on distribution of materials by elementary students in hallways and the cafeteria are intended to facilitate the movements of students between classes and at lunch and to reduce littering. We have here more than invocations of an

---

26 *Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 508 (5th Cir. 2009) (" Morse, ... did not concern content-neutral regulations.")

27 The content based restrictions are not at issue in this appeal.

28 See *Canady*, 240 F.3d at 443 ("Improving the educational process is undoubtedly an important interest of [the school board].").

abstract educational mission. The District's rationales were supported by an affidavit of the deputy superintendent and testimony by teachers at the 2005 hearing that these are a positive response to the types of incidents causing disruption in the past.[29]

Less clear is whether the District's policy is narrowly tailored to meet the District's interest and whether there are ample alternative channels of communication. While upholding most of the policy, the district court found the prohibition on distribution of materials in the elementary school cafeteria to be unreasonable-an inapt targeting of its objectives. We conclude that the policies as written are sufficiently narrowly tailored and are constitutional, at least on our invocation of "avoidance." Steering clear of constitutional shoal water, we read the term "distribution" to mean distribution of multiple items to multiple individuals and accept the District's further narrowing that it would not in any event reach the passing of a single note or book so long as it is not during time set aside for classroom instruction.[30]

---

29 For instance, one teacher testified that the first few moments of class often deter-mine the success of the rest of class. Pre-venting distractions in the moments before instructional periods begin is important to ensuring that the instructional periods begin and run smoothly.

30 "In evaluating a facial challenge to state law, a federal court must ... consider any limiting construction that a state court or enforcement agency has proffered." *Ward*, 491 U.S. at 796, 109 S.Ct. 2746 (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n. 5, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)); *Grayned v. City of*

The policies provide ample alternative channels of communication. All students may distribute materials before and after school, during recess and passively during school hours at designated tables. Moreover, middle school and secondary school students are permitted to distribute materials in the hallways and in the cafeterias during noninstructional time. While this freedom for the upper level students is not extended to distribution of materials within the classroom before instruction begins, the least restrictive regulation is not required. These are ample alternative channels of communication.

We turn to the claim that the restrictions on distribution by elementary school students in the cafeteria are invalid.[31] The District presented evidence that elementary school lunchrooms are heavily controlled yet near chaotic places where school administrators struggle to ensure that young students are able to take lunch in a limited period of time, and that elementary school students are not as mature and require more guidance than older students in order to ensure that they are able to move through the cafeteria quickly and efficiently.

As for impermissibly reducing alternative channels of communication, just like middle and secondary school students, elementary school students may still distribute written material before

---

Rockford, 408 U.S. 104, 110, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

[31] We do not reach the question whether similar restrictions would be acceptable if imposed on middle or secondary school students. As a matter of common sense, as students become older and more self-sufficient the need for restrictions lessens.

and after school as well as at recess. A student has several opportunities to distribute materials throughout the day. The alter-natives for communication are fulsome. This time, place, and manner regulation serves the powerful interests of the school in maintaining order and discipline, essential both to its duty to teach and the protected freedom of its students to speak. So construed, the very balance simultaneously teaches and protects the student. We find that the 2005 Policy is facially constitutional.

VI

The district court, accepting the magistrate's recommendation, found that, as the District was unlikely to return to the 2004 Policy, the request for injunctive and declaratory relief was moot. This is sound but it leaves aside plaintiffs' claim of nominal damages from the 2004 Policy. This court and others have consistently held that a claim for nominal dam-ages avoids mootness.[32] Given that

---

[32] See *Ward v. Santa Fe Indep. Sch. Dist.*, 393 F.3d 599, 601-03 (5th Cir. 2004) (recognizing *Ward v. Santa Fe Indep. Sch. Dist.*, 35 Fed.Appx. 386 (5th Cir. 2002) (per curiam) (reversing earlier judgment that claim for nominal damages did not avoid mootness and holding that a claim for nominal damages was sufficient)); see also *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) (holding a plaintiff could seek nominal damages in the absence of other damages for an alleged constitutional violation under § 1983); *Green v. McKaskle*, 788 F.2d 1116 (5th Cir. 1986) (same); 13C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3533.3 (3d ed. 1998) ("A valid claim for nominal damages should avoid mootness."). This view is supported by our sister circuits. See Van Wie v. Pataki, 267

the plain-tiffs will pursue their as-applied claim regardless of whether the 2004 Policy is found to be facially constitutional, we decline to address its merits with-out prior examination by the district court. We there-fore remand all claims addressing the 2004 Policy to the district court for further proceedings.[33]

The district court's judgment is AFFIRMED in part and REVERSED in part.

F.3d 109, 115 n. 4 (2d Cir. 2001) (holding a claim for nominal damages avoids mootness); *Doe v. Delie*, 257 F.3d 309, 314 (3d. Cir. 2001) (same); *Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 72 n. 5 (4th Cir. 1983) (same); *Murray v. Bd. of Trs., Univ. of Louisville*, 659 F.2d 77, 79 (6th Cir. 1981) (same); Bernhardt v. County of L.A., 279 F.3d 862, 871 (9th Cir. 2002) (same); *Utah Animal Rights Coalition v. Salt Lake City Co.*, 371 F.3d 1248 (10th Cir. 2004) (same). However, this rule has been challenged as "inconsistent with fundamental principles of justiciability." See *Utah Animal Rights Coalition*, 371 F.3d at 1263 (2004) (McConnell, J., concurring).

33 We note that to the extent that the only remaining relief the plaintiffs seek are nominal damages, a judgment awarding nominal damages would settle the matter, see Santa Fe Indep. Sch. Dist., 393 F.3d at 603, and doing so would not necessarily make plaintiffs prevailing parties entitled to attorney's fees. See *Buckhannon Bd. and Care Home v. W. Va. Dept. of Health and Human Resources*, 532 U.S. 598, 604 n. 6, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001) (citing *Farrar v. Hobby*, 506 U.S. 103, 115-16, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992)).

Appendix B

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 08-40707

Doug MORGAN; Robin Morgan; Jim Shell; Sunny Shell; Sherrie Versher; Christine Wade,
Plaintiffs-Appellants-Cross-Appellees,
v.
PLANO INDEPENDENT SCHOOL DISTRICT,
Defendant-Appellee-Cross-Appellant,
and
Lynn Swanson, in her individual capacity and as Principal of Thomas Elementary School; Jackie Bomchill, in her individual capacity and as Principal of Rasor Elementary School,
Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Texas, Sherman Division

---

Before KING, HIGGINBOTHAM, and CLEMENT, *Circuit Judges.*

PER CURIAM

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the

panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Patrick Higginbotham

United States Circuit Judge

Filed: January 5, 2010

Appendix C

UNITED STATES DISTRICT COURT, E.D. TEXAS, SHERMAN DIVISION

No. 4:04CV447.

Jonathan MORGAN, et al.,
Plaintiffs,

v.

THE PLANO INDEPENDENT SCHOOL DISTRICT, et al.,
Defendants.

MEMORANDUM ADOPTING IN PART AND MODIFYING IN PART REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

SCHELL, J.

Came on for consideration the above-referenced civil action, this court having heretofore ordered this case be referred to the United States Magistrate Judge for all pretrial purposes.

The report of the United States Magistrate Judge, which contains proposed findings of fact and recommendations for the disposition of "Plaintiffs' Motion for Partial Summary Judgment (Facial Challenge to PISD Policies)" [Doc. No. 27], "Defendant Plano Independent School District's ("PISD") Cross Motion for Summary Judgment"

[Doc. No. 53], "Plano ISD's Objections to Plaintiffs' Evidence Attached to Plaintiffs' Response to Plano ISD's Cross Motion for Partial Summary Judgment (Facial Challenge to Plano ISD Policies)" [Doc. No. 66], "Plaintiffs' Motion for Leave to Submit Additional Plano ISD Board Policy in Opposition to Arguments Raised in Plano ISD's Combined 1) Sur-reply to Plaintiffs' Reply to Plano ISD's Response to Plaintiffs' Motion for Partial Summary Judgment (Facial Challenge to PISD Policies) and 2) Reply to Plaintiffs' Response to Plano ISD's Cross Motion for Partial Summary Judgment" [Doc. No. 77], "Defendant's Objections to the Affidavit of Doug Morgan Attached to Plaintiffs' Sur-Reply to Plano ISD's Reply to Plaintiffs' Response to Plano ISD's Cross Motion for Summary Judgment" [Doc. No. 84], "Defendants' Motion for Leave to File Supplemental Summary Judgment Evidence" [Doc. No. 94], "Motion to Substitute Affidavit of David Morgan Attached to Document No. 78" [Doc. No. 119], and "Defendants' Objection to the Substitute Affidavit of Doug Morgan Attached to Document Number 78" [Doc. No. 121] have been presented for consideration.

The court having made a *de novo* review of the objections raised by Plaintiffs and Defendant PISD thereto, is of the opinion that the Magistrate Judge correctly applied the four categories of school speech in the Fifth Circuit as stated in *Canady v. Bossier Parish School Board*, 240 F.3d 497, 443 (5th Cir. 2001). Specifically, the Magistrate Judge correctly found that the 2005 Policy's regulations on speech were viewpoint neutral, and therefore, correctly applied the test for time, place and manner restrictions to the 2005 Policy.

The court also finds the Magistrate Judge's findings of fact and conclusions of law were correct with respect to the 2004 Policy and with respect to the 2005 Policy as it relates to the middle school and high school students. However, the court finds that the 2005 Policy as it relates to elementary students is overbroad with respect to the following provision:

4. District elementary school cafeterias, during designated meal periods, are provided for the limited purpose of providing students meals and/or other nutrition and for delivering instruction to students with regard to nutrition, time management, manners, responsibility, and group discipline. Due to this limited purpose and the financial costs and safety/security concerns associated with litter and/or trash in the cafeteria, students may not distribute materials in elementary school cafeterias during designated meal periods.

The court finds that this provision reaches more broadly than is reasonably necessary to protect PISD's legitimate interests. Accordingly, the Report and Recommendation of the United States Magistrate Judge is hereby modified to grant in part Plaintiffs' Motion for Partial Summary Judgment (Facial Challenge to PISD Policies) and to deny in part Defendant Plano Independent School District's ("PISD") Cross Motion for Summary Judgment as it pertains to this provision of the 2005 Policy.

The court finds that the remaining objections of Plaintiffs and the objections of Defendant PISD are without merit. Therefore, the court hereby adopts the findings and conclusions of the Magistrate

Judge, as modified herein, as the findings and conclusions of this court. It is, therefore,

ORDERED that the Magistrate Judge's Report is ADOPTED, as modified, as the opinion of the Court. It is further

ORDERED that Plaintiffs' Motion for Partial Summary Judgment (Facial Challenge to PISD Policies) is GRANTED IN PART AND DENIED IN PART, and Defendant Plano Independent School District's Cross Motion for Summary Judgment is GRANTED IN PART AND DENIED IN PART.

SIGNED this 26th day of February, 2007.

/s/ Richard A. Schell

United States District Judge

Appendix D

UNITED STATES DISTRICT COURT, E.D. TEXAS, SHERMAN DIVISION

No. 4:04CV447.

Jonathan MORGAN, et al.,
Plaintiffs,

v.

THE PLANO INDEPENDENT SCHOOL DISTRICT, et al.,
Defendants.

ORDER GRANTING MOTION TO CERTIFY COURT ORDER AS FINAL

On this day the court heard and considered Plaintiffs' and Defendant, Plano Independent School District's, motion pursuant to Rule 54(b) to certify the court's Order dated February 26, 2007 (Dkt. 132) as a final and appealable Order of the court. On February 26, 2007, (Dkt. 132), the court adopted in part and denied in part Plaintiffs' and Defendant's cross motions for summary judgment relating to the facial challenge to the school districts policies. After the court's order, the Supreme Court of the United States and the United States Court of Appeals for the Fifth Circuit decided two cases. *Deborah Morse, et. al v. Joseph Frederick*, 127 S. Ct. 2618 (June 25, 2007); and, *Enrique Ponce, Jr. v. Socorro Independent School District*, 508 F.3d 765

(5th Cir. 2007). The parties disagree concerning the applicability of these decisions to the court's Order (Dkt. 132).

In the interest of avoiding unnecessary expense for the parties and the unnecessary use of the court's scarce judicial resources, and because there is no reason for delay, the court, under Federal Rule of Civil Procedure 54(b), hereby to certifies the court's February 26, 2007 (Dkt. 132) Order as a Final Judgment on the separate and distinct issues presented in that Order.

The court finds that this action presents more than one distinct claim, including the claim regarding the facial constitutionality of the school district's policies on which the court has made its final decision in the Order dated February 26, 2007 (Dkt. 132), and that there is no just reason for delay in entering a Final Judgment as to that distinct and separate claim. The court further finds that in the interest of avoiding unnecessary time and expense and the unnecessary expenditure of the scarce judicial resources of the court, this court's resolution of the distinct legal question regarding the facial constitutionality of the school district policies should be made a Final Judgment so that these distinct legal questions may be presented to the United States Court of Appeals for the Fifth Circuit for resolution and decision.

The court directs the entry of a Final Judgment as to the claims decided in the court's February 27, 2007 Order (Dkt. 132), and expressly determines that there is no just reason to delay appellate review and that the claims decided in the February 27, 2007 Order (Dkt. 132) are distinct claims for

relief regarding the facial constitutionality of the school district's policies, and are distinct from the claims related to the as-applied analysis and the claims related to the individual Defendants. The court further finds that a decision by the United States Court of Appeals for the Fifth Circuit as to the applicable law will reduce the time for trial and will give the court and the parties direction as to the correct law that should be applied.

IT IS SO ORDERED.

SIGNED this the 30th day of June, 2008.

/s/ Richard A. Schell

United States District Judge

Appendix E

**UNITED STATES DISTRICT COURT,
E.D. TEXAS, SHERMAN DIVISION**

No. 4:04CV447.

Jonathan MORGAN, et al.,
Plaintiffs,

v.

The PLANO INDEPENDENT SCHOOL DISTRICT, et al.,
Defendants.

Jan. 30, 2007

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT (FACIAL CHALLENGE TO PISD POLICIES) AND GRANTING DEFENDANT PLANO ISD'S CROSS MOTION FOR SUMMARY JUDGMENT

DON D. BUSH, *United States Magistrate Judge.*

On this day came on for consideration Plaintiffs' Motion for Partial Summary Judgment (Facial Challenge to PISD Policies) [Doc. No. 27] and Defendant Plano Independent School District's ("PISD") Cross Motion for Summary Judgment [Doc.

No. 53]. On May 18, 2006, the court directed the parties to send a letter to the court listing all the documents the court should consider in deciding the cross motions for summary judgment. By letter dated May 18, 2006, Defendants notified the court of all the documents it believed the court should consider in resolution of the motions. Plaintiffs sent two letters to the court on May 19, 2006, notifying the court of the documents it should consider in the resolution of these motions. Based on these letters, the court considered the following documents in deciding these motions:

1) Plaintiffs' Motion for Partial Summary Judgment (Facial Challenge to PISD Policies) [Doc. No. 27].

2) Defendant PISD's Response to Plaintiffs' Motion for Partial Summary Judgment [Doc. No. 38].

3) Brief of *Amicus Curiae* Texas Association of School Boards Legal Assistance Fund in Support of Defendant PISD's Cross Motion for Summary Judgment [Doc. No. 48].

4) Order Granting Leave to File Brief of *Amicus Curiae* [Doc. No. 50].

5) Defendant PISD's Cross Motion for Summary Judgment [Doc. No. 53].

6) Plaintiffs' Reply to PISD's Response to Plaintiffs' Partial Motion for Summary Judgment (Facial Challenge to PISD Policies) [Doc. No. 54].

7) Plaintiffs' Response to Defendant PISD's Cross Motion for Summary Judgment (Facial Challenge to PISD Policies) [Doc. No. 59].

8) Plano ISD's Objections to Plaintiffs' Evidence Attached to Plaintiffs' Response to Plano ISD's Cross Motion for Partial Summary Judgment (Facial Challenge to Plano ISD Policies) [Doc. No. 66].

9) Plano ISD's Combined 1) Sur-reply to Plaintiffs' Reply to Plano ISD's Response to Plaintiffs' Motion for Partial Summary Judgment (Facial Challenge to PISD Policies) and 2) Reply to Plaintiffs' Response to Plano ISD's Cross Motion for Partial Summary Judgment [Doc. No. 75].

10) Plaintiffs' Motion for Leave to Submit Additional Plano ISD Board Policy in Opposition to Arguments Raised in Plano ISD's Combined 1) Sur-reply to Plaintiffs' Reply to Plano ISD's Response to Plaintiffs' Motion for Partial Summary Judgment (Facial Challenge to PISD Policies) and 2) Reply to Plaintiffs' Response to Plano ISD's Cross Motion for Partial Summary Judgment [Doc. No. 77].

11) Plaintiffs' Sur-Reply to PISD's Reply-to Plaintiffs' Response to PISD's Cross Motion for Summary Judgment (Facial Challenge to PISD Policies) [Doc. No. 78].

12) Defendant's Response to Plaintiffs' Motion for Leave to Submit Additional Plano ISD Board Policy [Doc. No. 83].

13) Defendant's Objections to the Affidavit of Doug Morgan Attached to Plaintiffs' Sur-Reply to Plano ISD's Reply to Plaintiffs' Response to Plano ISD's Cross Motion for Summary Judgment [Doc. No. 84].

14) *Amicus Curiae* Brief of United States Senator John Cornyn in Support of Plaintiffs'

Motion for Partial Summary Judgment [Doc. No. 86].

15) Order Granting Plaintiffs' Motion for Leave and Supplementation of the Summary Judgment and Cross Summary Judgment Evidentiary Record with PISD Administrative Regulation 043910 [Doc. No. 87].

16) Plaintiffs' Combined Response to Defendant PISD's Objections to the Affidavit of Doug Morgan and Plaintiffs' Motion to Withdraw and Substitute Affidavit [Doc. No. 89].

17) Defendants' Motion for Leave to File Supplemental Summary Judgment Evidence [Doc. No. 94].

18) Plaintiffs' Response to Defendants' Motion for Leave to File Supplemental Summary Judgment Evidence [Doc. No. 98].

19) Defendants' Reply to Plaintiffs' Response to Defendants' Motion for Leave to File Supplemental Summary Judgment Evidence [Doc. No. 100].

20) Plaintiffs' Sur-Reply to Defendants' Reply to Plaintiffs' Response to Defendants' Motion for Leave to File Supplemental Summary Judgment Evidence [Doc. No. 102].

21) Notice of Submission of Correspondence for Filing as Part of the Record [Doc. No. 106].

22) Plaintiffs' Supplemental Brief in Support of Plaintiffs' Motion for Partial Summary Judgment on the Facial Challenge to the PISD Distribution Policies [Doc. No. 115].

23) Defendants' Response to Plaintiffs' Supplemental Brief in Support of Plaintiffs' Motion for Partial Summary Judgment on the Facial Challenge to the Plano ISD Distribution Policies [Doc. No. 116].

24) Supplement to Doc. No. 78 Plaintiffs' Sur-Reply to Plano ISD's Reply to Plaintiffs' Response to Plano ISD's Cross Motion for Summary Judgment [Doc. No. 117].

25) Motion to Substitute Affidavit of David Morgan Attached to Document No. 78 [Doc. No. 119].

26) Order Granting Plaintiffs' Motion to Substitute Affidavit of Doug Morgan Attached to Document Number 78 [Doc. No. 120].

27) Defendants' Objection to the Substitute Affidavit of Doug Morgan Attached to Document Number 78 [Doc. No. 121].

Having considered these documents, the court is of the opinion that Plaintiffs' Motion for Partial Summary Judgment (Facial Challenge to PISD Policies) should be DENIED, and Defendant PISD's Cross Motion for Summary Judgment should be GRANTED.

PRELIMINARY MATTERS

Initially, the court will resolve several motions that are relevant to the resolution of the cross motions for summary judgment.

Plano ISD's Objections to Plaintiffs' Evidence Attached to Plaintiffs' Response [Doc. No. 66].

Defendant PISD objects to the attachment of a Dallas Morning News website article to the Affidavit of Doug Morgan because it is hearsay and contains numerous hearsay statements. This objection is sustained.

PISD also objects to the statements in Paragraphs 2-4 of Hiram S. Sasser III's affidavit as overly vague, non-specific and conclusory. This objection is overruled.

Finally, PISD objects that Paragraph 4 of Mr. Sasser's affidavit purports to make a statement of law, for which the affidavit establishes no foundation or competency for him to make. This objection is sustained.

1) *Defendants' Objections to the Affidavit of Doug Morgan Attached to Plaintiffs' Sur-Reply to Plaintiffs' Response to Plano ISD's Cross Motion for Summary Judgment [Doc. No. 84];* and

2) *Plaintiffs' Combined Response to Defendants' Objections to the Affidavit of Doug Morgan Attached to Plaintiffs' Sur-Reply And Plaintiffs' Motion to Withdraw Affidavit of Doug Morgan and to Substitute Amended Affidavit [Doc. No. 89]*

PISD objects to paragraph 8 of the Affidavit of Doug Morgan because the minutes referenced in the affidavit are not attached to the affidavit and the minutes themselves are the best evidence of the contents of the minutes. PISD objects to paragraph 9 of Mr. Morgan's affidavit because the allegations contained therein are irrelevant to the issues related to the facial constitutionality of the distribution policies at issue. In response, Plaintiffs' wish to withdraw their original affidavit and submit

an amended affidavit to which the minutes are attached. The Motion to Withdraw the Affidavit of Doug Morgan and to Substitute Amended Affidavit [Doc. No. 89] is granted. However, the Amended Affidavit of Doug Morgan is insufficient summary judgment evidence in that it fails to direct the court to any particular part of the attached minutes. It also fails to even identify what the minutes contain or do not contain.[1]

Paragraph 9 of the Amended Affidavit of Doug Morgan is substantively the same as paragraph 9 of the original Affidavit of Doug Morgan. Therefore, PISD's relevancy objection is not moot and should be considered. Paragraph 9 of Mr. Morgan's amended affidavit does not provide summary judgment evidence that is relevant to the facial constitutionality of PISD's distribution policies. Paragraph 9 and the attachment it references go to the application of the policies by Principal Swanson. Accordingly, PISD's objection to Paragraph 9 is sustained.

Defendants' Motion for Leave to File Supplemental Summary Judgment Evidence [Doc. No. 94]

PISD seeks leave to supplement its summary judgment evidence with, among other items, a transcript from the PISD public school board meeting held on November 1, 2005. During this meeting the PISD Board of Trustees heard

---

[1] Local Rule CV-56(c) provides that the court will not "scour the record in an attempt to determine whether the record contains an undesignated genuine issue of material fact for trial before entering summary judgment."

testimony from eleven educators on subjects relevant to the time, place, and manner restrictions set out in PISD's April 2005 Distribution Policy. For the most part, Plaintiffs' response to this motion addresses whether the evidence meets the standards set out in *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); however, whether the *Tinker* standard is the appropriate standard in this case is a disputed issue in the cross motions for summary judgment. Plaintiffs also argue that the evidence is not relevant. The court is of the opinion the evidence is relevant to the facial constitutionality of PISD's distribution policies.

Further, in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 439, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), the Supreme Court stated that if a plaintiff succeeds in raising doubt about the theory upon which a regulation is based, the burden then falls on the municipality, or PISD here, to "supplement the record with evidence renewing support for the theory that justifies the ordinance." And because PISD can justify its policies based on evidence developed prior to the adoption of the policies as well as evidence adduced at trial, it follows that Plano can justify its policies based on evidence developed prior to the adoption of its current policy, which is substantively identical to the April 2005 Policy. *N.W. Enterprises, Inc. v. City of Houston*, 352 F.3d 162, 175 (5th Cir. 2003). Finally, Plaintiffs will not be heard to complain about the timeliness of the supplemental evidence. Plaintiffs themselves have continued to file documents for the court's consideration in the resolution of these cross motions for summary

judgment on the facial constitutionality of the up until and including July of 2006. And Plaintiffs have failed to show that they will be prejudiced by PISD's delay in submitting this evidence. Accordingly, Defendant PISD's Motion for Leave to File Supplemental Summary Judgment Evidence [Doc. No. 84] is granted.

Defendants' Objection to the Substitute Affidavit of Doug Morgan Attached to Document Number 78 [Doc. No. 121]

The court granted Plaintiffs' Motion to Substitute Affidavit of David Morgan Attached to Document No. 78 on July 24, 2006. While PISD did not object to the filing of the substitute affidavit to correct a typographical error, it raised objections to the substance of the substitute affidavit. PISD objects to paragraph 8 of the substitute affidavit because the minutes referenced in the paragraph are not attached to the affidavit and the minutes themselves are the best evidence of their content. This objection is sustained.

PISD also objects to paragraph 9 of the substitute affidavit because the allegations contained therein are irrelevant to the issues related to the facial constitutionality of the distribution policies. As the court previously found with respect to an identical paragraph in Mr. Morgan's Amended Affidavit, paragraph 9 of Mr. Morgan's affidavit does not provide summary judgment evidence that is relevant to the facial constitutionality of PISD's distribution policies. Paragraph 9 and the attachment it references go to the application of the policies by Principal Swanson.

Accordingly, PISD's objection to Paragraph 9 is sustained.

BACKGROUND

On December 15, 2004, Plaintiffs filed Plaintiffs' Original Complaint requesting a temporary restraining order, preliminary and permanent injunctive relief, declaratory judgment, nominal damages, and attorney's fees and costs for constitutional violations. Plaintiffs also filed an Application for Temporary Restraining Order. On December 16, 2004, the court held a hearing on Plaintiffs' Application for Temporary Restraining Order at which the court granted Plaintiffs' application and issued a Temporary Restraining Order. The Temporary Restraining Order prohibited Defendants from "interfering with or prohibiting Plaintiffs and other students from distributing religious viewpoint gifts to classmates at the December 17, 2004 'winter break' parties at Plano Independent School District ...." The Temporary Restraining Order also prohibited Defendants from interfering with or prohibiting Doug and Robin Morgan from distributing religious viewpoint gifts to parents at the winter break parties and prohibited Defendants from deliberately causing students to feel embarrassed, uncomfortable or fearful because of a student's exercise of a legal right.

The distribution policy in effect when this law suit was initiated was a version of the GNAA(LOCAL) (the "2004 Policy").[2] On April 4,

---

[2] The relevant portions of the 2004 Policy provide:

2005, the PISD Board of Trustees adopted and enacted a new version of FNAA(LOCAL) (the "April 2005 Policy"),[3] which replaced the 2004 Policy. On

---

The District's classrooms during the school day are provided for the limited purpose of delivering instruction to students in the courses and subjects in which they are enrolled. Hallways in school buildings are provided for the limited purpose of facilitating the movement of the students between classes and allowing access to assigned lockers. Classrooms and hallways shall not be used for the distribution of any materials over which the school does not exercise control.

Each school campus shall designate an area where materials that have been approved for distribution by students in accordance with this policy may be made available or distributed. Campus principals may develop reasonable time, place, and manner restrictions regarding the distribution of materials to designated areas.

All written material over which the school does not exercise control and that is intended for distribution shall be submitted to the building principal or designee for prior review according to [specific] procedures.

[3] The relevant portions of the April 2005 and November 2005 Policies provide:

1. "Classroom" is defined as any location designated for providing and/or facilitating: student instruction; student education; achievement of curricular objectives; achievement of state-mandated learning requirements; school-sponsored extracurricular activities; and/or school-sponsored programming for students. In addition to traditional classrooms, the term "classroom" includes, but is not limited to, school campus gymnasiums, auditoriums, cafeterias, hallways and outdoor facilities ...

2. Elementary, middle, and secondary campuses have different distribution policies and guidelines due to the age/maturity of students and the highly structured learning environment of elementary campuses. "Elementary" campuses are defined as campuses designated for students up to fifth

grade. "Middle" and "secondary" campuses are defined as campuses designated from sixth grade through twelfth grade.

DISTRIBUTION ON ELEMENTARY CAMPUSES BY STUDENTS

Elementary campuses have restrictions that are narrowly tailored to meet the District's legitimate concerns regarding providing instruction, providing education, maintaining discipline, and/or achieving the curricular objectives and/or state-mandated learning requirements. The following regulations apply to the distribution of materials between elementary students while on elementary campus, subject to the restrictions identified in LIMITATIONS ON CONTENT herein.

1. Students may distribute material 30 minutes before school and 30 minutes after school hours at any entrance or exit to the school and at any "gathering area(s)" approved by the principal, the location of distribution in each of these areas to be designated by the principal.

2. Distribution of materials is not permitted in the classroom during school hours with the exception of during the three annual parties designated by the District.

3. District elementary school hallways during school hours are provided for the limited purpose of facilitating the safe, organized, and structured movement of students between classes and allowing access to assigned lockers providing and/or facilitating: student instruction; student education; achievement of curricular objectives; achievement of state-mandated learning requirements; school-sponsored extracurricular activities; and/or school-sponsored programming for students. Due to this limited purpose and the financial costs and safety/security concerns associated with litter and/or trash in the hallways, students may not distribute materials in elementary school hallways during school hours.

4. District elementary school cafeterias, during designated meal periods, are provided for the limited purpose of providing students meals and/or other nutrition and for delivering instruction to students with regard to nutrition, time management, manners, responsibility, and group discipline.

Due to this limited purpose and the financial costs and safety/security concerns associated with litter and/or trash in the cafeteria, students may not distribute materials in elementary school cafeterias during designated meal periods.

5. Students may distribute materials during designated recess periods.

6. Students may leave materials on the "distribution table" and/or any other such designated area so others may obtain a copy. Each school campus principal shall designate an area where materials may be available or distributed.

7. Students may distribute materials during the three annual parties designated by the District.

8. Campus principals may develop other reasonable time, place, and manner restrictions regarding the distribution of materials at areas designated by the principal.

9. Students may distribute materials in areas not addressed by this policy subject to the reasonable time, place, and manner restrictions developed by the campus principal and the guidelines outlined herein ...

DISTRIBUTION ON MIDDLE AND SECONDARY CAMPUSES BY STUDENTS

Middle school and secondary school campuses have restrictions that are narrowly tailored to meet the District's legitimate concerns regarding providing instruction, providing education, maintaining discipline, and/or achieving curricular objectives and/or state-mandated learning requirements. The following guidelines apply to distribution of materials between middle and secondary school students while on middle and secondary campuses, subject to the restrictions identified in LIMITATIONS ON CONTENT herein.

1. Subject to the restrictions herein, students may distribute materials 30 minutes before school hours and 30 minutes after school hours at any entrance or exit to the school and at any "gathering area(s)" approved by the principal, the location of distribution in each of these areas shall be designated by the principal.

2. Distribution of materials is not permitted in the classrooms during school hours.

3. Middle and secondary students may distribute materials in middle and secondary school hallways during noninstructional times during school hours.

4. Middle and secondary students may distribute materials in middle and secondary campus cafeterias during designated lunch periods and noninstructional time.

5. Students may leave materials on the "distribution table" and/or any other designated area so that others may obtain a copy. Each school campus principal shall designate an area where materials that have been approved for distribution by students in accordance with this policy may be made available or distributed.

6. Campus principals may develop other reasonable time, place, and manner restrictions regarding the distribution of materials at areas designated by the principal.

7. Students may distribute materials in areas not addressed by this policy, subject to the reasonable time, place, and manner restrictions developed by the campus principal and the guidelines outlined herein....

"Limitations on Content" include materials that are obscene, vulgar or otherwise inappropriate for the age and maturity of the audience; materials that endorse actions endangering the health or safety of the students; materials that advocate violation of school rules and fall within the legal standard found in the FNAA (LEGAL) policy; materials that advocate imminent lawless or disruptive action and are likely to incite or produce such action; materials that include hate literature that scurrilously attacks ethnic, religious, or racial groups and similar publications aimed at creating hostility and violence if they fall within the standard described in FNAA (LEGAL); and materials about which there is reasonable cause to believe would result in material and substantial interference with any school education and/or curricular related activity that blocks or impedes the safe flow of traffic within hallways and entrance or exit ways of the school.

November 1, 2005, the PISD Board of Trustees conducted a public meeting at which it heard additional evidence in the form of the testimony of eleven educators regarding aspects of education related to the school's distribution policy. After hearing this testimony, the PISD Board of Trustees re-adopted the same policy that it had adopted in April of 2005. The FNAA(LOCAL) policy adopted on November 1, 2005 (the "November 2005 Policy") is substantively the same as the April 2005 Policy, with one addition: the November 2005 Policy includes a Preamble to Policies FNAA(LOCAL) and GKD(LOCAL) (the "Preamble"). The Preamble memorializes the PISD Board of Trustees' reasons for adopting and enacting the November 2005 Policy. The parties filed cross motions for summary judgment on the facial constitutionality of the 2004 Policy and the April 2005 Policy. The November 2005 Policy was adopted after these cross motions were filed.

SUMMARY JUDGMENT STANDARD

The granting of summary judgment is proper if "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The trial court must resolve all reasonable doubts in favor of the party opposing the motion. *Casey Enters. v. Am. Hardware Mut. Ins. Co.*, 655 F.2d 598, 602 (5th Cir. 1981) (citations omitted). The party seeking summary judgment carries the burden of demonstrating that there is no actual dispute as to any material fact in the case. This burden, however, does not require the moving party to produce evidence showing the absence of a genuine issue of

material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). The moving party satisfies its burden by "pointing out to the district court ... that there is an absence of evidence to support the nonmoving party's case." *Id.*

Federal Rule of Civil Procedure 56 does not impose a duty on a district court to "sift through the record in search of evidence to support a party's opposition to summary judgment." *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 463 (5th Cir. 1996) (citations omitted). Once the moving party has satisfied its burden, the nonmovant must "set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). Such nonmovant must also articulate the precise manner in which evidence he sets forth supports his claims. *See Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994) (citation omitted). Moreover, in designating specific facts, the nonmovant must " 'go beyond the pleadings' " and use " 'his own affidavits, ... deposition[s], answers to interrogatories, and admissions on file.' " *Jones v. Sheehan & Young Culp, P.C.*, 82 F.3d 1334, 1338 (5th Cir. 1996) (citation omitted).[4]

If the nonmovant fails to set forth specific facts in support of allegations essential to that party's claim and on which that party will bear the burden

---

[4] The court also notes that Local Rule CV-56(b) states that a party's response to a summary judgment motion should "be supported by appropriate citations to proper summary judgment evidence...." Local Rule CV-56(c) further states that the court will not "scour the record in an attempt to determine whether the record contains an undesignated genuine issue of material fact for trial before entering summary judgment."

of proof, then summary judgment is appropriate. *Celotex*, 106 S.Ct. at 2552-53. Even if the nonmovant brings forth evidence in support of its allegations, summary judgment will be appropriate unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986) (citations omitted).

DISCUSSION

The Supreme Court has cautioned that all First Amendment rights accorded to students must be construed "in light of the special characteristics of the school environment," and that the federal judiciary should not "intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *Epperson v. Arkansas*, 393 U.S. 97, 105, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968).

At issue here is the very narrow question of whether the 2004 and 2005 policies are facially constitutional. Both parties cite the court to different precedents to support their positions. The law in this area is not crystal clear, and trial courts as well as appellate courts are frequently called upon to address complex as well as pedantic issues.

I. The 2004 Policy

Plaintiffs argue that the 2004 Policy is unconstitutional under *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). PISD argues that the 2004 Policy is constitutional, that *Tinker* is not the correct standard and that after the adoption of the 2005 Policies, the issue of whether the 2004 Policy is facially constitutional became moot. The court will first address whether the facial constitutionality of the 2004 Policy is moot.

In *Clark, et al. v. Dallas ISD, et al.*, 806 F.Supp. 116 (N.D.Tex.1992), the Plaintiffs challenged the facial constitutionality of the Dallas Independent School District ("DISD") 1984-85 Policy. Plaintiffs did not dispute that DISD had changed its 1984-85 Policy. The court found that "[b]ecause there is no reason for the court to believe that Defendants will revert to the 1984-85 policy, the court will not consider the facial validity of the 1984-85 policy." While the court found the *Clark* plaintiffs' claims for declaratory and injunctive relief were moot, it found the damage claims were not moot. And the court was left to decide what damages, if any, the Plaintiffs were entitled to receive as a result of the application of the 1984-85 policy.

In *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982), the Supreme Court stated that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." The Court found that it was a question of the exercise rather than the existence of jurisdiction. If evidence exists

that shows a defendant will reenact the old statute, then the question is not moot, and the court can resolve the facial challenge. In *Aladdin's Castle*, the defendant, through its prior conduct, displayed a likelihood that it would return to its prior practice; therefore, the Court found that it had jurisdiction over the appeal and that the trial court should determine whether the likelihood of the defendant reverting back to its old statute was sufficiently remote to make injunctive relief unnecessary. *Id.* at 289.

In *Bauer v. The Presiding Judge of Probate Court Number 3 of Harris County*, 341 F.3d 352, 358 (5th Cir. 2003), the court stated that " '[p]ast exposure to illegal conduct does not in itself show a present case or controversy requiring injunctive relief ... if unaccompanied by any continuing, present adverse effects.' " (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983)). In order to obtain equitable relief for past wrongs, a plaintiff must demonstrate a continuing harm or a real or immediate threat of defendant repeating the injury in the future. Somewhat troubling is the Defendants' Answer, which states that schools have an obligation to protect the children and educational environment by having a facially "neutral" policy that " 'discourages' non-curricular messages aimed at proselytizing...." "Factual assertions in pleadings are judicial admissions conclusively binding on the party that made them." *White v. ARCO/Polymers, Inc.*, 720 F.2d 1391, 1396 (5th Cir. 1983). *See also Morales v. Dep't of the Army*, 947 F.2d 766, 769 (5th Cir. 1991); *Davis v. A.G. Edwards & Son*, Inc., 823 F.2d 105, 108 (5th Cir. 1987). This judicial

admission contradicts the District's assertion that the policy is neutral.

Plaintiffs argue that Defendant will revert back to the old policy and that prospective relief is necessary to prevent PISD from returning to its old unlawful ways. Plaintiffs claim that in its Answer, PISD has suggested it will continue to engage in religious viewpoint discrimination and that PISD refused to adopt a new policy prior to the filing of this lawsuit. Plaintiffs also submit that because the Texas Association of School Boards has a version of the 2004 Policy on its website, a mootness finding is inappropriate.

The ultimate question is whether there is a reasonable expectation that the wrong will be repeated. *Id.* PISD must demonstrate that there is no such reasonable expectation. PISD adopted a new policy in April of 2005 that grants more First Amendment privileges to students, relaxes time, place, and manner restrictions, and eliminates its prior restraints. PISD re-adopted this same policy after hearing testimony from educators within the district. Further, PISD specifically represented to this court that it would not revert back to the 2004 Policy. Since any attempt to revert back will most likely end up in this court, the court will take the District at its word. While that representation alone may not be enough to render moot Plaintiffs' facial challenge to the 2004 Policy, that representation combined with the adoption of the April 2005 and November 2005 Policies clearly demonstrates that there is no reasonable expectation that Defendant will reenact the 2004 Policy. *United States v. WT Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed.

1303 (1953). Further, this case does not concern what the TASB website contains. The conduct and representations of PISD and its lawyers establish that there is no reasonable expectation that PISD will revert back to the 2004 Policy.[5] As a result, the facial constitutionality of the 2004 Policy is moot. Judge Brown has already ruled on this issue and the court declines to revisit the issue. This is not to say that the 2004 Policy as applied to the Plaintiffs was constitutional and that the requirement of review was not arbitrary and whimsical as applied to the Plaintiffs, particularly in light of the Defendant's judicial admission that the policy was enacted to discourage proselytizing.

II. The April 2005 Policy and the November 2005 Policy

The April 2005 and November 2005 Policies (collectively "2005 Policies") are substantively the same, with one exception: the November 2005 Policy contains a Preamble.[6] However, the November

---

[5] Under Federal Rule of Civil Procedure 11(b)(1), the attorney who signs a pleading, motion or other paper is "**certifying** that to the best of that person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,-... it is not being presented for any improper purpose...."

[6] ***Preamble to Policies FNAA(LOCAL) and GKD(LOCAL)***

WHEREAS, the Board of Trustees finds it is the mission of the District to teach and train its students state and federally mandated curriculum and learning requirements, social skills and values, order, discipline, and respect for authority and each other; and

WHEREAS, the Board of Trustees finds that without first establishing discipline and maintaining order at the schools, teachers cannot begin to educate their students; and

WHEREAS, the Board of Trustees finds the District has a limited amount of time available to teach its students the above; and

WHEREAS the Board of Trustees finds that students should have an opportunity to distribute non-school materials in a manner that does not disrupt the educational process, the order and discipline of the schools and/or the operation of the schools; and

WHEREAS, the provisions of Policies FNAA(LOCAL) and GKD(LOCAL) are intended to regulate the time, place and manner of non-school materials during times and places when the District is attempting to operate the schools and teach its students the above which the Board of Trustees finds to be reasonable and content neutral; and

WHEREAS, the Board of Trustees finds the provisions of Policies FNAA(LOCAL) and GKD(LOCAL) are intended to decrease distractions, to decrease disruption, to increase the time available and dedicated to learning, and to improve the educational process, environment, safety and order at District schools and not invade or collide with the rights of others; and

WHEREAS, the Board of Trustees finds the provisions of Policies FNAA(LOCAL) and GKD(LOCAL) relating to elementary schools are also intended to facilitate the safe, organized and structured movements of students between classes and at lunch, as well as to reduce littering; and

WHEREAS, the Board of Trustees finds that, from an educational perspective, the distribution of non-school materials during times and places when the District is attempting to teach students is both distracting and a material and substantial disruption to the educational process and environment and to the order and discipline of the schools; and

WHEREAS, the Board of Trustees finds the provisions of the Policies FNAA(LOCAL) and GKD(LOCAL) leave open

2005 Policy is a re-adoption of the April 2005 Policy, which PISD made after hearing the testimony of eleven educators. For purposes of analyzing the facial constitutionality of the 2005 Policies themselves, they are considered together here.

Plaintiffs argue that the *Tinker* standard-material and substantial interference with schoolwork or discipline-is the correct standard to be applied to the distribution policies in this case. *Tinker v. Des Moines Independent Community School District, et al.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). In *Tinker,* school officials suspended students from public high school because they wore black armbands to school to protest the Vietnam War. The Court stated that "First Amendment rights, applied in light of the special circumstances of the school environment, are

---

alternative forms of communication of non-school materials, such as alternative times and places to distribute such materials, non-disruptive oral speech, and "distribution tables"; and

WHEREAS, the Board of Trustees acknowledges receipt of testimony from educators, professionals and others and various written materials, including, but not limited to, studies, research, evaluations, and other findings that overwhelming [sic] support the adoption of Policies FNAA(LOCAL) and GKD(LOCAL); and

WHEREAS, the Board of Trustees believes that, to better improve the educational process, environment, safety and order at District schools, it is necessary to adopt the reasonable time, place and manner regulations in Policies FNAA(LOCAL) and GKD(LOCAL);

The Board of Trustees hereby approves and adopts the above findings to support the passage of and hereby adopts Policies FNAA(LOCAL) and GKD(LOCAL).

available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech of expression at the schoolhouse gate." *Id.* at 506. *Tinker* was a viewpoint discrimination case. Students were suspended based on the political viewpoint of their speech. The Court found it relevant that the school authorities did not purport to prohibit the wearing of all political or controversial symbols. Students in some of the schools wore buttons relating to national political campaigns, and some wore Iron Crosses. The order prohibiting armbands did not extend to these, so the Court found that "[c]learly, the prohibition on expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." *Id.*

Defendants argue that the correct standard to be applied to the 2005 Policies is the standard applicable to time, place, and manner restrictions or the *O'Brien* test. *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968); *see also Canady v. Bossier Parish School Board*, 240 F.3d 437, 443 (5th Cir. 2001) (stating that for the purposes of a constitutional challenge to the policy, the *O'Brien* test and the test applicable to time, place and manner restrictions are virtually the same). PISD relies on *Canady* for the proposition that the Fifth Circuit has rejected the blanket application of the *Tinker* analysis in any and all student speech cases. In *Canady* the plaintiffs sued the school board for an injunction against the enforcement of a mandatory school uniform policy.

The Fifth Circuit found that the level of scrutiny applied to regulations of student expression depends on the substance of the message, the purpose of the regulation and the manner in which the message is conveyed. The Fifth Circuit specifically found *Tinker* was applicable to school regulations directed at student viewpoints, and *Tinker* does not account for regulations that are completely viewpoint-neutral. *Canady*, 240 F.3d at 443. The present case presents just such a situation where the regulations are viewpoint-neutral. The 2005 Policies are regulations on the time, place and manner of student distribution of non-school materials. Nothing on the *face* of the policies discriminates against a particular viewpoint, and the summary judgment evidence does not establish that PISD's intent in adopting these policies was to discriminate against a particular viewpoint. As a result, *Tinker* is not the standard to be applied in this case for determining the facial constitutionality of the 2005 Policies.

In fact, the 2005 Policies greatly expand the First Amendment rights of students in the Plano school district. Materials are no longer subject to a prior submission rule in either elementary or middle and secondary schools. Students are simply subject to time, place and manner restrictions. The ultimate question is whether those restrictions are reasonable. "When, where, and how children can distribute literature in a school is for educators, not judges, to decide provided such choices are not arbitrary or whimsical." *Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1543 (7th Cir. 1996). Expression by high school students may be limited by reasonable and equally-applied time,

place and manner restrictions. *Shanley v. Northeast Indep. Sch. Dist.*, 462 F.2d 960 (5th Cir. 1972). In fact, the state may even enforce regulations of time, place and manner of expression in traditional public forums, such as a park or a public street, provided those regulations are content-neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication. *Chiu, et al. v. Plano ISD, et al.*, 260 F.3d 330 (5th Cir. 2001) (Chiu I). Government regulation of speech is content neutral if it is "justified without reference to the content of the regulated speech." *Ward, et al. v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661, S.Ct. 2746, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). And while the regulation must be narrowly tailored to serve a significant governmental interest, it is not required to be the least intrusive means of achieving the desired end. This "less-restrictive-alternative analysis ... has never been part of the inquiry into the validity of a time, place, and manner regulation." *Id.* Time, place, and manner restrictions are not invalid "simply because there is some imaginable alternative that might be less burdensome on speech." *Id.* The "narrowly tailored" requirement is satisfied if the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation; however, the government cannot regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. While content-neutral time, place and manner restrictions must be narrowly tailored, strict scrutiny is not applicable to time, place and manner restrictions.

Id. Finally, the regulation must leave open alternative channels of communication.

With regard to the time, place and manner regulations the 2005 Policies set out for elementary schools, the regulations are content-neutral. The stated purposes of the regulations in the 2005 Policies are providing instruction, providing education, maintaining discipline, and/or achieving curricular objectives and/or state mandated learning requirements. As set out above, the 2005 Policies also restrict distribution of non-school materials in the elementary school hallways. Plano ISD's stated purposes for this regulation are facilitating the safe, organized, and structured movement of students between classes and allowing access to assigned lockers for providing and/or facilitating: student instruction; student education; achievement of curricular objectives; achievement of state-mandated learning requirements; school-sponsored extracurricular activities; and/or school-sponsored programming. The 2005 Policies also prohibit distribution of non-school materials in elementary cafeterias during designated meal times. This regulation promotes the stated purpose of Plano ISD's elementary cafeterias during designated mealtimes of providing students meals and/or other nutrition and for delivering instruction to students with regard to nutrition, time management, manners, responsibility, and group discipline. These policies also help to reduce financial costs and ensure safety and security caused by litter and trash. These regulations are justified without relation to the content of the non-school materials.

These regulations are narrowly tailored to achieve a significant governmental interest. Improving the educational process is an important and substantial interest of a public school system. *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 286 (5th Cir. 2001). The regulations only restrict the time and the place for distribution of non-school materials to the extent necessary to further its interests. The purpose of any public school is the education of its students. Certainly in an elementary setting, more structure is required to ensure that the limited time allotted for instruction is maximized, while still being careful to protect the First Amendment rights of students. Here, Plano ISD has narrowly tailored its time and place regulations to further its interest of providing education and instruction to elementary students.

Finally, the 2005 Policies leave open ample alternative channels of communication. Elementary students may distribute non-school literature 30 minutes before school, 30 minutes after school, during designated recess periods, on a designated distribution table and during the three holiday parties. The alleged prohibition of distributing non-school material at Plano ISD holiday parties has been a focal point of this litigation and was the primary reason for Plaintiffs' application for a temporary restraining order in December of 2004. This provision eliminates any confusion as to whether elementary students may exchange non-school materials at these parties. These provisions leave ample opportunity for elementary students to distribute non-school materials. Because the time and place regulations placed on the distribution of non-school materials by Plano ISD elementary

students during school hours are content neutral, narrowly tailored to promote a significant governmental interest, and leave open alternative avenues of communication, the 2005 Policies are facially constitutional.

The 2005 Policies also put time and place regulations on middle and secondary school students. Middle and secondary school students (sixth through twelfth grades) may distribute non-school materials 30 minutes before and 30 minutes after school hours at any school entrance or exit and at any "gathering areas" approved by the principal, in the school hallways during non-instructional time during school hours, in school cafeterias during designated lunch periods and non-instructional time, and students may leave materials on a "distribution table." Essentially, middle and secondary school students are prohibited from distributing non-school materials in the classrooms during school hours. Again, the PISD's stated interests are providing instruction, providing education, maintaining discipline, and/or achieving curricular objectives and/or state mandated learning requirements. These interests are significant and are content-neutral. With respect to middle and secondary school students, the time and place regulations are narrowly drawn to serve Plano ISD's interest in providing education and instruction to its students. Middle and secondary school students are only prohibited from distributing non-school materials in the classroom. Math class is for learning math and a regulation that does not permit students to exchange materials that do not relate to math class in the classroom is narrowly tailored to that end. Plano ISD has

recognized that middle and secondary school students do not need as structured an environment as do elementary school students, and these regulations reflect that recognition. Further, ample alternative channels of communication exist. These students may distribute non-school materials at entrances before school and after school, in the halls during non-instructional times, and during lunch and in the cafeteria during non-instructional times. In fact, Michael Novotny, principal of Jasper High School, testified at the November 1, 2005 public board meeting that the 2005 Policies provided over two hours during which students could distribute non-school materials during the school day over a great deal of the campus. Accordingly, the time, place and manner regulations as to middle and secondary school students are reasonable and facially constitutional.

III. Objective Evidence

As previously discussed, the November 2005 Policy and the April 2005 Policy are substantively the same, with one addition, a preamble, which memorializes the board's legislative intent. The Plano ISD school board held a public meeting on November 1, 2005, at which it received additional objective evidence to support its policy. After hearing this evidence, the Plano ISD school board re-adopted the April 2005 Policy and added a preamble.

Plaintiffs argue repeatedly that Plano ISD has failed to offer objective evidence to establish that the speech in question can be constitutionally regulated. Plaintiffs repeatedly state that this is PISD's burden under *Tinker*. However, *Tinker* is not

the applicable standard because the 2005 Policies are content-neutral and only regulate the time, place and manner of the distribution. The Fifth Circuit in *Shanley* only required that the school board demonstrate reasonableness in its regulations. *Shanley*, 462 F.2d at 971 (5th Cir. 1972). The court in *Shanley* went on to state that the school administration need not stay a reasonable exercise of restraint until a disruption actually occurs. *Id.* And here PISD does not even impose a restraint on speech; it merely imposes reasonable regulations.

Even though the April and November 2005 Policies are facially reasonable regulations of time, place and manner, PISD has provided summary judgment evidence in the form of the Affidavit of Danny Modisette and the supplemental summary judgment evidence, which includes a transcript of the testimony of professional educators.

In his affidavit, Deputy Superintendent Modisette states that he has been an educator in public schools for thirty-five years and has served in his current position for PISD for the past five years. Based on his experience, Modisette states that he has personal knowledge of the disruption to one or more students caused by the distribution of non-school materials, such as birthday cards, concert tickets and inanimate objects. Modisette states that these disruptions ultimately cause a material disruption of the learning environment. Modisette met with elementary principals throughout PISD to discuss their observations concerning whether the distribution of non-school materials during instructional time caused a material disruption.

Based on their experience and observations, the principals expressed to Modisette that such distribution creates a material disruption. Modisette stated that he advised the PISD Board of Trustees of this information prior to the adoption of the April 2005 Policy.

The transcript of the public PISD school board meeting held on November 1, 2005 contains additional evidence supporting the reasonableness of the time, place and manner regulations. Eleven educators testified based on their observations and experience. Elizabeth Kirby, principal of Beverly Elementary, testified that the distribution of non-school items can particularly cause disruptions in the elementary school setting when the distributions, such as an invitation, are not made to every student. Students spend time discussing who did not receive an invitation and then spend time consoling students who did not receive an invitation. This process takes attention off instructional time and shifts students' focus from the lesson to the distribution. Ms. Kirby further testified that distribution in the elementary hallways can often result in tardiness, which distracts from instructional time. Pam Murray, principal of Mitchell Elementary testified that in moving hundreds of students, ages five through eleven, through the halls during the school day requires orderliness procedures. In the hallways, elementary students are learning how to follow the directions of teachers, respect for other students in classrooms adjacent to the hallway and efficient use of time. Distribution of non-school items during this time is not favorable in achieving these goals. Principal Murray also stated that during the lunch

period in elementary cafeterias, teachers and cafeteria staff spend time teaching students to make nutritious choices, to be polite to cafeteria workers, to be responsible and enter their own PIN numbers and to walk safely in between tables without bumping into someone. She further testified that there are approximately 100 to 120 students in each grade level. These students have 30 minutes to enter the cafeteria, wait in line, get their lunches and eat their lunches, and all of this can only be accomplished by having routines set out each day. As previously stated Michael Novotny, principal of Jasper High School, testified that the 2005 Policies allow students to distribute non-school materials for a total of over two hours during the school day. Bonnie Manley, principal of Murphy Middle School, testified that instructional time begins when the students enter the classroom, if not before and cited a specific example of instruction beginning during the four minute passing period.

Plaintiffs argue that this evidence is insufficient as supposition and unsubstantiated fears. However, the Fifth Circuit has often deferred to the school administration regarding school policies. *See Canady*, 240 F.3d at 441 (finding that educators have an essential role in regulating school affairs and in establishing appropriate standards of conduct); *Shanley*, 462 F.2d at 967 (stating "[t]hat courts should not interfere with the day-to-day operations of schools is a platitudinous but eminently sound maxim which this court has reaffirmed on many occasions."); *Burnside v. Byars*, 363 F.2d 744, 748 (5th Cir. 1966) (recognizing that the establishment of an educational program requires rules and regulations necessary for the

orderly classroom learning and that officials have a wide latitude of discretion in implementing such rules and regulations). The testimony of the educators themselves on the effects of distribution of non-school materials in the public school is competent summary judgment evidence to support the reasonable regulations provided in the policies.

IV. Vagueness

Plaintiffs also argue that PISD's distribution policies are void for vagueness. Invalidation of a law for vagueness is appropriate if the terms of the statute are so indefinite that "men of common intelligence must necessarily guess at its meeting and differ as to its application." *Reeves v. McConn*, 621 F.2d 377, 383 (5th Cir. 1980). PISD's 2005 policies are not vague. Men of common intelligence would understand what type of speech is regulated, that is non-school materials at the specific times and places set out in the policies. Plaintiffs have failed to raise any specific argument as to how men of common intelligence would only be able to guess at the meaning of the 2005 Policies; therefore, the 2005 Policies are not invalid based on vagueness.

V. Overbroad

Finally, Plaintiffs argue that PISD's distribution policies are unconstitutionally overbroad. "If, at the expense of First Amendment freedoms, a statute reaches more broadly than is reasonably necessary to protect legitimate state interests, a court may forbid its enforcement." However, the United States Supreme Court has "cautioned that invalidation of state laws for facial overbreadth is a remedy that should be applied 'sparingly and only as a last

resort.' " *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973)). The extent to which the statute is overbroad must be both real and substantial. *Id.* Plaintiffs complain that the policy restricts speech that does not cause a material or substantial disruption; however, this is not the standard applied to regulations on time, place and manner. Plaintiffs put forth examples such as a senior handing an admission packet to a friend during English class and a sixth grader handing a note to her friend at her locker. First, the 2005 Policies do not prohibit a sixth grader from handing a note to her friend at their lockers. Second, these examples hardly rise to the level of being substantially overbroad. English class is for education in English. A policy is not substantially overbroad if it restricts the English classroom to that purpose. Accordingly, the 2005 Policies are not overbroad.

RECOMMENDATION

Based upon the foregoing, it is the Court's recommendation that Plaintiffs' Motion for Partial Summary Judgment (Facial Challenge to PISD Policies) [Doc. No. 27] should be DENIED and Defendant Plano Independent School District's Cross Motion for Summary Judgment [Doc. No. 53] should be GRANTED.

Within ten (10) days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C.A. § 636(b)(1)(C).

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days after service shall bar an aggrieved party from *de novo* review by the district court of the proposed findings and recommendations and from appellate review of factual findings accepted or adopted by the district court except on grounds of plain error or manifest injustice. *Thomas v. Arn*, 474 U.S. 140, 148, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988).

Appendix F

UNITED STATES DISTRICT COURT, E.D. TEXAS, SHERMAN DIVISION

Jonathan MORGAN, et al.,
Plaintiffs,

v.

The PLANO INDEPENDENT SCHOOL DISTRICT, Lynn Swanson, individually and as principal of Thomas Elementary School, Lisa Long, individually and as principal of Wells Elementary School, Suzie Snyder, individually, Jaclyn T. Bomchill (a/k/a Jackie Bomchill), individually and as principal of Rasor Elementary School, John Beasley, individually, Carole Greisdorf, individually and as the Assistant Superintendent of the Plano Independent School District, and Doug Otto, individually and as the Superintendent of Plano Independent School District,
Defendants.

Feb. 20, 2007

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE GRANTING IN PART AND DENYING IN PART INDIVIDUAL DEFENDANT'S MOTION TO DISMISS BASED ON QUALIFIED IMMUNITY

DON D. BUSH, *United States Magistrate Judge*.

On this day came on for consideration the Individual Defendants' Motion to Dismiss Based on Qualified Immunity [Doc. No. 30]. Having considered the motion, Plaintiffs' Response [Doc. No. 41], the Individual Defendants' Reply [Doc. No. 52] and Plaintiffs' Surreply [Doc. No. 56], the Court is of the opinion the motion should be granted in part and denied in part.

BACKGROUND

On December 15, 2004, Plaintiffs filed Plaintiffs' Original Complaint requesting a temporary restraining order, preliminary and permanent injunctive relief, declaratory judgment, nominal damages, and attorney's fees and costs for constitutional violations. Plaintiffs filed their Amended Complaint on May 20, 2005 and their Second Amended Complaint on August 18, 2005. In their Second Amended Complaint, Plaintiffs brought claims against several PISD employees and officials in their individual capacities, including Lynn Swanson (principal of Thomas Elementary), Lisa Long (principal of Wells Elementary), Suzie Snyder (teacher at Thomas Elementary), John Beasley (PISD Security Police Services), Carole Greisdorf (Assistant Superintendent of PISD), and Doug Otto (Superintendent of PISD) (collectively the "Individual Defendants").[1] The Individual Defendants moved for dismissal under Federal Rule of Civil Procedure 12(b)(6) on the basis of qualified immunity.

---

[1] Jaclyn, or "Jackie" Bomchill was also sued in her individual capacity; however this Individual Defendants' motion does not address the claims against her.

The relevant facts for the purposes of resolving this motion involve four separate incidents that allegedly occurred on various campuses at PISD.[2] In their Second Amended Complaint, Plaintiffs allege the following facts:

1. 2002-2003 W.H.L. Wells Elementary School

During the two years prior to the 2002-2003 academic year at Wells Elementary, Michael Shell and Kevin Shell were allowed to distribute invitations or tickets for events at their church to fellow students. Other students were also allowed to distribute secular non-school materials. During the 2002-2003 academic school year, Suzie Snyder was Kevin Shell's teacher and Lisa Long was the principal at Wells Elementary. In late March to early April of 2003, Kevin Shell took religious viewpoint invitations and tickets to distribute to his classmates, inviting them to attend the Prestonwood Baptist Church Easter Sunrise service. Ms. Snyder informed Kevin that he could not distribute the tickets while on school property because they were religious. Kevin asked Ms. Snyder when he could announce to his classmates that he had tickets to distribute and to actually distribute the tickets. After consulting with Principal Long, Ms. Snyder informed Kevin that the tickets were "inappropriate materials" for discussion and distribution by one student to another student

---

[2] Plaintiffs Second Amended Complaint also includes an incident that occurred in 2001 involving Christina and Michaela Wade; however, the Wade Plaintiffs do not seek damages for the 2001 actions, only equitable relief.

while on school property. Snyder further informed Kevin that he could never discuss or distribute the religious viewpoint tickets to his school classmates during school.

On Monday, April 7, 2003, Michael and Kevin Shell took tickets for the Prestonwood Easter Sunrise Service to school and offered these free tickets to their classmates at Wells Elementary. Michael Shell's teacher, Ms. Krauss, told Michael Shell that he could verbally tell his classmates about the sunrise service and could offer them a ticket if they would like to take one. Kevin Shell made this same request of Ms. Snyder, and after conferring with Principal Long, Ms. Snyder informed Kevin Shell that he could not, at any time, discuss or distribute the free tickets to the sunrise service while he was on school property.

On Friday, May 2, 2003, Kevin and Michael Shell took free tickets for another Prestonwood Baptist Church program to school in order to offer the tickets to their classmates. Michael Shell was permitted to verbally announce the program, to discuss the program with this classmates and to offer tickets to those classmates showing an interest. Ms. Snyder did not allow Kevin Shell to verbally announce that he had tickets or to offer the tickets for the program to his classmates. In response to Ms. Snyder's decision, Sunny Shell, Kevin and Michael Shell's mother, called both Ms. Snyder and Principal Long. Principal Long returned Sunny Shell's call, and when asked by Sunny Shell why Kevin Shell was not allowed to announce and distribute the tickets, Principal Long responded

that perhaps Ms. Snyder misunderstood the PISD policy.

On Monday, May 5, 2003, Carole Greisdorf, PISD Assistant Superintendent, returned a call that Sunny Shell had made to the PISD Board of Trustees president Mary Beth King. Sunny Shell requested that Ms. Greisdorf provide the correct interpretation and application of the PISD policy with regard to announcing and distributing materials from one student to another. Ms. Greisdorf stated that Michael Shell's teacher violated PISD policy by allowing Michael Shell to announce in class and distribute tickets and that Principal Long and Ms. Snyder had acted in accordance with PISD policy. Ms. Greisdorf stated that under PISD policy, the Shells could not announce or offer any religious material or religious information to any other student at any time while on school property. Ms. Greisdorf further stated that the Shells could not distribute tickets during lunch and recess because lunch was a part of the social studies curriculum and recess was part of the physical education curriculum. Ms. Greisdorf explained to Sunny Shell that the policies allowing students to form religious led activities, pass out literature and make announcements only applied to secondary schools. Ms. Greisdorf sent Sunny Shell an email referring her to a PISD policy on time, place and manner of distribution and to the staff handbook, which does not allow students to hand out invitations to private parties. Michael Shell and Kevin Shell never offered more than ten tickets to any classmates.

2. 2003 Thomas Elementary School Winter Break Party

The Thomas Elementary School Winter Break Party was scheduled for December 19, 2003. Students were allowed to distribute a small gift to their classmates at the party, and Jonathan Morgan wanted to give a candy cane ink pen with a laminated bookmark attached containing a religious message entitled "The Legend of the Candy Cane."[3] Jonathan Morgan wanted to include this gift in a sealed goodie bag for each of his classmates with the inscription "To: [classmate's name] From: Jonathan Morgan."

In previous years, students were not allowed to give gifts with a religious viewpoint or a religious message. On November 28, 2003, Doug and Robin Morgan, Jonathan Morgan's parents, contacted PISD seeking clarification of the school's policy as it related to the distribution, by one student to

---

[3] The laminated bookmark read: The Legend of the Candy Cane. A candy maker wanted to invent a candy that was a witness to Christ. First of All, he used a hard candy cane because Christ is the Rock of Ages. This hard candy was shaped so that it would resemble a "J" for Jesus, or turned upside down, a shepherd's staff. He made it white to represent the purity of Jesus. Finally, a red stripe was added to represent the blood Christ shed for the sins of the world, and three thinner red stripes he received on our behalf when the Roman soldiers whipped him. Sometimes a green stripe is added as a reminder that Jesus is a gift from God. The flavor of the cane is peppermint, which is similar to hyssop. Hyssop is in the mint family and was used in the Old Testament for purification and sacrifice. Jesus is the pure Lamb of God, come to be a sacrifice for the sins of the world. So, every time you see a candy cane, remember the message of the candy maker: Jesus is the Christ!!

another student while on PISD property, of non-school material containing religious viewpoints, symbols and messages. PISD personnel directed Doug Morgan to Ms. Greisdorf. Ms. Greisdorf suggested that Doug Morgan set up a meeting with Principal Swanson to discuss the student-to-student distribution of religious materials.

On December 4, 2003, Doug and Robin Morgan and Robin Morgan's parents met with Principal Swanson. Principal Swanson confirmed that in the past, school officials had questioned parents and students regarding whether their goodie bags contained any religious viewpoint or religious reference material and had confiscated any such material. Principal Swanson further stated that PISD personnel would continue this practice in the future. Principal Swanson also confirmed that the term "Winter Break" would be used to describe the party instead of "Christmas," and that "Christmas" was a religious viewpoint term that should not be used to describe events at PISD schools. Principal Swanson stated that she would investigate whether teachers instructed PISD students to write "Happy Holidays" instead of "Merry Christmas" on greeting cards and whether the colors red and green were restricted from the Winter Break parties, but she did confirm that all symbols which represented Christmas or the Christian religion would be banned. Principal Swanson further told Doug Morgan that the distribution of secular gifts would be permitted including Jonathan Morgan's candy cane ink pen; however, the bookmark bearing "The Legend of The Candy Cane" would not be permitted because of the religious message it contained.

Principal Swanson later informed Doug Morgan that she confirmed with PISD administration that her explanation was correct. And on December 17, 2003, Doug Morgan sent Ms. Greisdorf an email about his conversation with Principal Swanson and Jonathan Morgan's desire to hand out his "The Legend of the Candy Cane" gift. Doug Morgan asked Ms. Greisdorf if giving this gift was a violation of PISD policy. Ms. Greisdorf responded that Principal Swanson's interpretation was exactly right and that the PISD policies prohibited Jonathan Morgan from distributing his religious gifts. Ms. Greisdorf also stated that no student could distribute a religious viewpoint gift while on school property and that Jonathan Morgan could only disseminate his information by placing it on the information table or by distributing it off school property.

On December 19, 2003, Doug and Jonathan Morgan went to the Thomas Elementary School office to attempt to meet with Principal Swanson prior to Jonathan Morgan taking his goodie bags to class, but Principal Swanson was not able to meet with them. Doug and Jonathan Morgan took Jonathan's tray of goodie bags, which contained "The Legend of the Candy Cane" bookmarks, to the classroom and placed the tray outside of the classroom. Jonathan Morgan's teacher Ms. Helmke told Doug and Jonathan Morgan that Jonathan could only place his goodie bags in the school library and could not bring them into the classroom because the bags contained religious material. Other students were allowed to bring their goodie bags into the classroom. Principal Swanson arrived at Ms. Helmke's classroom and said that Jonathan Morgan could only place his goodie bags in the

school library, but Principal Swanson did not require other students to take their goodie bags to the school library. Doug Morgan informed Swanson that Ms. Helmke told him that Jonathan Morgan's materials were not permitted in the classroom because of the religious viewpoint they contained, and Principal Swanson stated that Ms. Helmke had acted in accordance with PISD policy. Principal Swanson then made an announcement that students could not take materials into the classroom.

On December 19, 2003, Doug and Robin Morgan again went to meet with Principal Swanson before the party. Principal Swanson again confirmed that Jonathan Morgan could not hand out his gifts that contained a religious message at the party. Doug Morgan asked if he could distribute the gifts to other parents, but Swanson stated that Doug Morgan could not distribute the laminated "The Legend of the Candy Cane" cards to adults.[4] Principal Swanson then went to Jonathan Morgan's classroom and informed Doug Morgan that the distribution rules for religious materials applicable to students were also applicable to parents and that he would only be permitted to distribute the laminated cards in the library or off campus. During the 2003 Winter Break party, other students were allowed to give gifts, and Mrs. Helmke distributed pencils bearing a picture of a snowman to the students.

---

[4] Parents were invited to attend the 2003 Winter Break party at Thomas Elementary School.

3. 2003-2004 Hughston Elementary

On January 20, 2004, Sunny Shell sent an email to Ms. Greisdorf concerning the distribution at school of tickets to the Harvest Rally, a religious event being sponsored by Prestonwood Baptist Church. Ms. Greisdorf referred Sunny Shell to Policy FNAA (LOCAL) and directed Shell to contact her school principal. On January 22, 2004, Sunny Shell met with Hughston Elementary Principal Collins and asked if Kevin and Michael Shell could disseminate, share or offer the Harvest Rally tickets during non-instructional time and in a non-disruptive manner. Principal Collins stated that according to PISD policy, Kevin and Michael Shell would never be permitted to distribute religious materials while on school property and could not make an announcement about the tickets in class or during recess. On January 26, 2004, Sunny Shell emailed PISD Superintendent Dr. Doug Otto concerning the distribution of tickets to religious viewpoint events to students while on school property. Ultimately, Michael and Kevin Shell were not permitted to distribute tickets to the Harvest Rally while at school, but other students were permitted to exchange non-school materials on school property. Sunny Shell did not receive any response from Ms. Greisdorf or Dr. Otto indicating that Kevin and Michael Shell would be permitted to distribute the Harvest Rally tickets

4. 2004 Rasor Elementary School

In 2004, Stephanie Versher, a student at Rasor Elementary, spoke to classmates with whom she was in close association, about a drama depicting the crucifixion of Jesus Christ at her church. If the

students expressed an interest in attending, Stephanie Versher would give the student a free ticket. The principal of Rasor Elementary, Jackie Bomchill, instructed Stephanie Versher's teacher to stop Stephanie from distributing the tickets and to require the students who had already received a ticket to return it. Stephanie Versher's teacher instructed her to stop distributing the free tickets to her classmates while school property. The tickets that Stephanie Versher had already given to her classmates were collected by the teacher and discarded.

At Rasor Elementary, if a student's birthday falls in the summer months, the student may celebrate her "half birthday" during the school year with her classmates at school. Stephanie Versher wanted to celebrate her half birthday at school with her classmates on January 16, 2004. Other students had celebrated their birthdays and half birthdays prior to January 16, 2004, and on those occasions, the students would distribute a snack and a small gift to their friends and classmates. Stephanie Versher and her sister Susan had received various gifts at the parties of other students, including a Chinese Bookmark with a printed message on it, a Lion King ring containing words and symbols, a pencil with an eraser and picture of penguins, a pencil bearing various symbols, and a pencil with the words "Where's Hippo?" printed on it. Bomchill had never prohibited these gifts prior to January 16, 2004.

The half birthday parties are celebrated during non-curriculum time at school-usually at the end of the lunch period or during a snack break between

instructional periods. Stephanie Versher wanted to bring brownies and pencils bearing the words "Jesus loves me this I know for the Bible tells me so" to distribute to her friends and classmates. Sherrie Versher, Stephanie Versher's mother, obtained two types of pencils for Stephanie to hand out at her half birthday party. One was the "Jesus love me" pencil, and the other was a pencil with the word "Moon" printed on it. Pursuant to a school rule concerning distribution of candy and food at school, Sherrie Versher went to school to meet with Principal Bomchill on January 15, 2004 in order to obtain permission to distribute brownies the following day, but Principal Bomchill was unable to meet with Sherrie Versher that day. On January 16, 2004, Sherrie Versher took her brownies and the two pencils that Stephanie wanted to give to her classmates-one religious, one secular-to the school office and requested to see Principal Bomchill.

Upon arriving at Principal Bomchill's office, John Beasley, with PISD Security Police Services, handed Sherrie Versher a letter in which Beasley accused Sherrie Versher of a violation of PISD policies by distributing materials to students on school property at Rasor Elementary and informed Sherrie Versher that law enforcement officials would be called to the school to arrest Sherrie Versher. The letter specifically cited PISD policy "GKD Local Community Relations: Use of School Facilities for Non-School Purposes; Subsection titled Distribution of Non-School Literature." Sherrie Versher believed Beasley's letter to be a threat in response to the lawful exercise of her Constitutional rights. Sherrie Versher was then escorted into Principal Bomchill's office.

Principal Bomchill informed Sherrie Versher that if her daughter did not cease distributing religious materials while on school property, the police would be called; Principal Bomchill stated that Stephanie Versher could only distribute religious tickets and religious pencils outside the school building. Sherrie Versher showed Principal Bomchill the brownies and pencils that Stephanie planned to distribute that day. Principal Bomchill informed Sherrie Versher that Stephanie could hand out the brownies and the "Moon" pencils, but that she could not hand out the "Jesus loves me" pencils. Sherrie Versher then asked if she could speak with an attorney regarding the legal restrictions PISD could place on the religious pencils. Sherrie Versher ultimately removed the religious pencils from the gift and placed them in her purse.

Sherrie Versher left the office with her tray of brownies and the "Moon" pencils, and as she exited the office she "thought out loud to herself 'Satan is in the building.' " Sherrie Versher then carried the brownies and the "Moon" pencils to the party. Beasley followed her and stood against the wall near the party. After the party concluded, Sherrie Versher walked Stephanie to her locker and handed the "Jesus loves me" pencils to Stephanie and told her to put them in her backpack and not take them out during school. Sherrie Versher then told her daughter that she could distribute the pencils after school on the school lawn. Sherrie Versher then proceeded to the second-grade wing of the building where her younger daughter was a student. Beasley followed her down the second-grade wing and when Sherrie Versher inquired why he was following her,

Beasley stated that he was escorting her out of the building and advised her that the police were on their way. Beasley stated that Sherrie Versher had made a threat and created a disturbance. As Sherrie Versher exited the Rasor Elementary campus, she was pulled over by two Plano police officers. One of the officers inquired about the threat, and ultimately, Sherrie Versher was allowed to leave.

After school, Stephanie Versher attempted to distribute her "Jesus loves me" pencils to her friends on the school lawn. Principal Bomchill took away a pencil that Stephanie had handed to one of her friends and told Stephanie that she was in violation of PISD policy; Stephanie was not allowed to distribute religious viewpoint pencils while on school property. Principal Bomchill and Beasley then approached Sherrie Versher and stated that if Stephanie tried to distribute her religious pencils while on school property again, she would be kicked out of school.

DISCUSSION

The Individual Defendants moved to dismiss the claims against them, and in the alternative, moved for summary judgment on the claims against them. A stay on discovery in this case is currently in place and a motion for summary judgment is therefore premature. Accordingly, the court will treat the Individual Defendants motion as a motion to dismiss on the basis of qualified immunity pursuant to Federal Rule of Civil Procedure 12(b)(6).

Rule 12(b) (6) Motion to Dismiss Standard

A motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6) "is viewed with disfavor

and is rarely granted." *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997). For a complaint to be dismissed for failure to state a claim, it must appear "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957); *Reeves v. City of Jackson, Mississippi*, 532 F.2d 491 (5th Cir. 1976). The Court must accept as true all well-pleaded facts contained in plaintiff's complaint and view them in the light most favorable to the plaintiff. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). In addition, all reasonable inferences are to be drawn in favor of the plaintiff's claims. *Lowrey*, 117 F.3d at 247. The ultimate question in a Rule 12(b)(6) motion is whether the complaint states a valid cause of action when it is examined in the light most favorable to the plaintiff and with every doubt resolved in the plaintiff's favor. *Lowrey*, 117 F.3d at 247. However, to survive a Rule 12(b)(6) motion, the plaintiff must plead specific facts, not mere conclusory allegations. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992).

Qualified Immunity

The Individual Defendants raise the defense of qualified immunity to the claims against them. Qualified immunity shields government officials performing discretionary functions from individual liability for civil damages "insofar as their conduct does not violate clearly established rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); *Thompson v. Upshur County*,

245 F.3d 447, 456 (5th Cir. 2001). Qualified immunity serves to ensure that before a government official can be subjected to suit in her individual capacity, she is on notice that her conduct is unlawful. *Saucier v. Katz*, 533 U.S. 194, 206, 121 S.Ct. 2151, 2158, 150 L.Ed.2d 272 (2001). Whether a government official is shielded from suit by qualified immunity is determined by a two-step analysis. *Flores v. City of Palacios*, 381 F.3d 391, 395 (5th Cir. 2004); see also *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002) (noting that when a defendant invokes qualified immunity, the burden is on the plaintiff to demonstrate the inapplicability of the defense). First, the court must determine whether the plaintiffs' allegations, if true, establish a constitutional violation. *Hope v. Pelzer*, 536 U.S. 730, 736, 122 S.Ct. 2508, 2513, 153 L.Ed.2d 666 (2002). And when qualified immunity is asserted, Plaintiffs are required to specifically plead the facts establishing the right to recover. *Shultea v. Wood*, 47 F.3d 1427, 1430 (5th Cir. 1995). Second, the court must determine whether a particular defendant's actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Hope*, 536 U.S. at 739.

For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, ... but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.* (quoting

Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)) (internal citation omitted).

First Amendment

Plaintiffs generally argue that the Individual Defendants imposed unlawful prior restraints on Plaintiffs, and more specifically, Plaintiffs argue that each named individual defendant is not entitled to qualified immunity because he or she engaged in viewpoint discrimination.

Prior Restraints

It has been long recognized that "ordinances regulating speech contingent on the will of an official-such as the requirement of a license or permit that may be withheld or granted in the discretion of an official-are unconstitutional burdens on speech classified as prior restraints." *Chiu, et al. v. Plano Independent School District*, et al., 339 F.3d 273, 280 (5th Cir. 2003). And a "prohibition on the distribution of literature is a classic form of prior restraint." *Id.* There is nothing per se unconstitutional about a requirement that students submit materials to school officials before distributing those materials. *Shanley v. Northeast Independent School District*, 462 F.2d 960, 969 (5th Cir. 1972). However, a rule " 'subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.' " *Chiu*, 339 F.3d at 280. (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1075)). "A party enforcing a prior restraint 'carries a heavy

burden of showing justification for the imposition of such a restraint.' " *Id.* (quoting *Org. For a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971)). The Fifth Circuit in Chiu held that prior restraints were unconstitutional, even in schools, except where they "are designed to maintain discipline or to prevent school disruption and are narrowly drawn to achieve that end." *Id.*

Viewpoint Discrimination

Plaintiffs also allege viewpoint discrimination. "'The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.' " *Chiu v. Plano Independent School District*, 260 F.3d 330, 350-51 (5th Cir. 2001) (quoting *Rosenberger v. Rector & Visitors Univ. of Va.*, 515 U.S. 819, 828, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995)). "Viewpoint discrimination violates the First Amendment regardless of the forum's classification." *Hobbs v. Hawkins*, 968 F.2d 471, 481 (5th Cir. 1992). When school regulations are directed at specific student viewpoints, those viewpoints are governed by the standard of scrutiny set out in *Tinker v. Des Moines Independent Community School District. Canady v. Bossier Parish School Board*, 240 F.3d 437, 442 (5th Cir. 2001). In *Tinker*, the United State Supreme Court held that First Amendment rights were available to students and teachers while at school and stated that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506, 89 S.Ct. 733, 736

21 L.Ed.2d 731 (1969). *Tinker* was a viewpoint discrimination case in which school officials suspended students from public high school because they wore black armbands to school to protest the Vietnam War. Students were suspended based on the political viewpoint of their speech. The Court found it relevant that the school authorities did not purport to prohibit the wearing of all political or controversial symbols. Students in some of the district's schools wore buttons relating to national political campaigns, and some wore Iron Crosses. The order prohibiting armbands did not extend to these, so the Court found that "[c]learly, the prohibition on expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." *Tinker*, 89 S.Ct. at 738-39. Thus, when a school regulation is directed at restricting a student's expression of a particular viewpoint, the school must demonstrate that the expression would " 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.' " *Id.* at 738. Otherwise, that regulation is unconstitutional.

Plaintiffs have alleged claims against seven different PISD employees and officials in their individual capacities based on at least four different occurrences at various PISD campuses. Therefore, the Court will address each individual defendant in turn.

1. Lisa Long, Principal of Wells Elementary School

First, the Court must determine whether Plaintiffs allegations, if true, establish a constitutional violation on the part of Principal Long. Plaintiffs have alleged in their Second Amended Complaint that Principal Long abridged the First Amendment rights of Kevin Shell by directing Ms. Snyder to prohibit Kevin from announcing, discussing or distributing his religious viewpoint tickets while on school property. Specifically, Kevin Shell alleges that under the direction of Principal Long, Snyder informed Kevin Shell that the tickets he wished to distribute to his classmates, inviting them to the Prestonwood Baptist Church sunrise service, were inappropriate materials for student-to-student distribution or discussion while on school property because of the religious viewpoint of the materials. Despite Ms. Snyder's instructions, Kevin brought the tickets to school for distribution, and Plaintiffs allege that on the direction of Principal Long, Snyder instructed Kevin that he could not, at any time while on school property, discuss or distribute tickets to the sunrise service. On one more occasion in the spring of 2003, Kevin Shell brought tickets for a program at Prestonwood Baptist Church to distribute to his classmates at school. Ms. Snyder did not allow Kevin to announce that he had tickets for distribution or to offer tickets to his classmates. When Sunny Shell, Kevin's mother, contacted Principal Long and inquired why Kevin was not able to announce and distribute the tickets, Principal Long allegedly responded that perhaps Ms. Snyder misunderstood PISD policy.

With respect to Principal Long, Plaintiffs do not specifically argue that Long imposed a prior restraint on Kevin Shell's distribution of tickets to a religious event. Kevin was not asked to submit materials for review by a school official prior to distribution. Instead, Plaintiffs allege that Principal Long engaged in viewpoint discrimination by forbidding the announcement, distribution or even the discussion of the tickets to religious events at Prestonwood Baptist Church by Kevin Shell to his classmates while on school property. Accepting the facts pled in the Second Amended Complaint as true, Plaintiffs have alleged facts that would establish viewpoint discrimination on the part of Principal Long. Under Tinker, this type of prohibition on expression is unconstitutional unless the Principal Long can show that the distribution of the tickets caused a material or substantial interference with schoolwork or discipline. Plaintiffs allege that, even upon Sunny Shell's inquiry, no explanation was offered for the refusal to allow Kevin Shell to distribute religious viewpoint tickets. Therefore, under the facts as alleged by Plaintiffs, Principal Long failed to establish that Kevin Shell's distribution of tickets to religious events at Prestonwood Baptist church would cause a material or substantial disruption of schoolwork or discipline. As a result, Plaintiffs have pled facts sufficient to establish a constitutional violation on the part of Principal Long.

Next the court must determine whether Principal Long's actions violated clearly established statutory or constitutional rights of which a reasonable person would have known. Tinker was decided more than thirty years prior to the alleged

unconstitutional acts were committed by Principal Long in the spring of 2003. In 2001, the Fifth Circuit specifically stated in Canady that Tinker provided the applicable standard of scrutiny to be applied when a school official engages in viewpoint discrimination. And in July of 2003, only months after the acts allegedly committed by Principal Long occurred, the Fifth Circuit in Chiu, specifically found that a reasonable school official would know that engaging in viewpoint discrimination was unlawful. Therefore, a reasonable school official in Principal Long's position would have known that prohibiting speech based on the viewpoint of the expression is a violation of clearly established constitutional rights. Principal Long is not entitled to dismissal under Federal Rule of Civil Procedure 12(b)(6) on the basis of qualified immunity.

2. Suzie Snyder, Teacher at Wells Elementary School

As previously discussed with respect to Principal Long, Ms. Snyder's prohibition of announcing, distributing or discussing religious materials while on school property constitutes viewpoint discrimination. Taking the facts as Plaintiffs have alleged them as true, Ms. Snyder failed to establish that Kevin Shell's distribution of tickets to religious events at his church would cause a material and substantial disruption. Ms. Snyder did not simply forbid Kevin from discussion or distribution of his religious viewpoint materials during class; rather, she allegedly prohibited the discussion or distribution of the tickets at all times while on school property. Accordingly, Plaintiffs allegations, if true, establish a constitutional violation.

As previously set forth with respect to Principal Long, the law regarding a school official's viewpoint discrimination was clearly established at the time that Ms. Snyder allegedly prohibited Kevin Shell's distribution or discussion of religious materials while on school property. Accordingly, Ms. Snyder is not entitled to dismissal of the claims against her on the basis of qualified immunity.

3. Lynn Swanson, Principal of Thomas Elementary School

With respect to Principal Swanson, the court must initially determine whether Plaintiffs allegations, if true, establish a constitutional violation. Plaintiffs have alleged in their Second Amended Complaint that Principal Swanson abridged Jonathan Morgan's First Amendment rights by prohibiting Jonathan from distributing a bookmark containing a religious message-"The Legend of the Candy Cane"-to his classmates at the Thomas Elementary Winter Break party because of the religious message it contained. Plaintiffs contend that Principal Swanson confirmed to Doug Morgan that in previous years, teachers had questioned parents and students regarding whether their goodie bags contained religious viewpoint or religious reference materials and had confiscated such materials. Principal Swanson also indicated that school officials at Thomas Elementary would continue that practice. On December 19, 2003, the day of the Winter Break party, Jonathan Morgan was prohibited from bringing his goodie bags into the classroom and was instructed that he could only leave his goodie bags on the distribution table in the library because the bags contained religious

material. Other students were permitted to bring their goodie bags into the classroom. Principal Swanson informed Doug Morgan that Jonathan's teacher had acted in accordance with PISD policy by directing Jonathan to place his goodie bags on the distribution table in the library instead of in classroom because of their religious content. The fact that PISD officials questioned students regarding the contents of their goodie bags could arguably be considered a prior restraint. However, PISD allegedly only questioned students and parents about whether their goodie bags contained religious viewpoint material. It appears that the Plaintiffs are actually alleging viewpoint discrimination. PISD officials were not reviewing the materials in order to issue a license or approval; rather, they were solely looking for religious viewpoint materials and confiscating any such materials. These allegations that Swanson committed viewpoint discrimination, without her having established that Jonathan's distribution of the bookmarks would cause a material and substantial disruption of schoolwork or discipline, are sufficient to establish a constitutional violation by Principal Swanson.

Next the court must determine whether the constitutional violation was clearly established at the time of the alleged acts by Principal Swanson such that a reasonable person in her position would have known of the illegality of her actions. The court is of the opinion that the law was clearly established under Tinker, Canady and Chiu as previously discussed with regard to the distribution of Jonathan Morgan's religious viewpoint bookmarks during a Winter Break party in which

students were allowed to distribute secular gifts without incident.

The Individual Defendants argue that *Waltz v. Egg Harbor Township Bd. of Edu.*, 342 F.3d 272 (3d Cir. 2003) creates uncertainty as to whether the law was clearly established. However, Waltz does not create an ambiguity as to the state of the law in this circuit based on the facts alleged by Plaintiffs. In Waltz, the plaintiff student also wanted to distribute a gift to his classmates that had a religious message during the holiday party, but the gifts distributed to the students were neutral gifts collected by the parent teacher organization beforehand and distributed by the parents at the party. Students were not only prohibited from distributing religious gifts, but were also prohibited from distributing gifts with a political or a commercial message pursuant to an unwritten school policy. *Id.* at 273. Additionally, in Waltz, the plaintiff student was allowed to distribute his gifts containing a religious message at recess, after school and in the hallways. *Id.* at 280. In the present case, the individual students themselves brought goodie bags to school for distribution to their classmates. Further, Plaintiffs allege that Jonathan Morgan was not allowed to distribute his gifts containing a religious message at all while he was on school property; rather, he could only leave his goodie bags on a table in the library, while other students could hand out gifts that contained secular messages in the classroom. Waltz is not binding authority in this circuit and even though it can be considered persuasive authority, it does not cast doubt onto the status of the law that binds this court with respect to viewpoint discrimination.

Plaintiffs also allege that Principal Swanson infringed on the constitutional rights of Doug and Robin Morgan by not allowing them to distribute the "Legend of the Candy Cane" bookmarks to other parents at the party because of the religious nature of the bookmark. In order to determine whether the rights of Doug and Robin Morgan were abridged, the court would typically need to conduct a forum analysis. However, as set out in Chiu, viewpoint discrimination is unconstitutional regardless of the forum. Therefore, for purposes of the Individual Defendants' motion to dismiss pursuant to Rule 12(b)(6), Plaintiffs have alleged facts that, taken as true, establish that Swanson violated the constitutional rights of Doug and Robin Morgan.

With respect to Principal Swanson's prohibiting the distribution of the bookmarks from Doug and Robin Morgan to other parents at the Winter Break party, the law was also clearly established. In July of 2003, roughly five months prior to the 2003 Winter Break party, the Fifth Circuit specifically held that viewpoint discrimination was unconstitutional regardless of the forum.[5] *Chiu*, 260 F.3d at 350-51. Accordingly, Principal Swanson is not entitled to dismissal on the basis of qualified immunity.

4. Dr. Doug Otto, Superintendent of Plano Independent School District

In January of 2004, Sunny Shell's children Kevin and Michael Shell again wished to distribute tickets

---

[5] Plano ISD was a party to that litigation; therefore, PISD officials should have known about the status of the law with respect to viewpoint discrimination.

to a Harvest Rally being held at Prestonwood Baptist Church. During 2004, Kevin and Michael Shell attended Hughston Elementary. The principal of Hughston elementary informed Sunny Shell that Kevin and Michael Shell would never be permitted to distribute religious materials while on school property and could not make an announcement about the tickets during class or recess. Plaintiffs allege that on January 26, 2004, Sunny Shell emailed Dr. Otto concerning the distribution of tickets to religious viewpoint events while on school property. Plaintiffs further allege that Sunny Shell did not receive a response from Dr. Otto indicating that Kevin and Michael Shell would be permitted to distribute the tickets to the Harvest Rally.

Plaintiffs seek to hold Dr. Otto individually liable for civil damages based on these allegations. Plaintiffs have failed to make any allegation that Dr. Otto specifically prohibited any expression on the part of the Shells, much less an allegation that he did so based on the viewpoint of the expression. Taking the facts alleged in the Second Amended complaint as true, Plaintiffs have failed to establish a cause of action against Dr. Otto in his individual capacity; rather, Dr. Otto is entitled to dismissal of the claims against him in his individual capacity under the doctrine of qualified immunity.

5. John Beasley, Security Police Specialist for Plano ISD's East Cluster

First, the court must determine whether Plaintiffs allegations against Mr. Beasley in his individual capacity, if true, establish a constitutional violation. Plaintiffs have alleged in their Second Amended Complaint that Mr. Beasely

threatened Sherrie Versher in response to the exercise of her constitutional rights by delivering a letter to Ms. Versher upon her arrival at Principal Jackie Bomchill's office on January 16, 2004. Plaintiffs allege that on January 15, 2004, Ms. Versher attempted to meet with Principal Bomchill in order to obtain permission for her daughter Stephanie Versher to distribute brownies the following day at her half birthday party. Principal Bomchill was not available on January 15, 2004, so Ms. Versher again attempted to meet with Principal Bomchill immediately before Stephanie's half birthday party on January 16, 2004, in order to obtain permission for Stephanie to distribute brownies and two pencils to her classmates. It was upon her arrival at Principal Bomchill's office that Mr. Beasley handed her the letter he had prepared, which referred her to PISD policies and informed her that if she violated the policies, law enforcement officials would be called. Prior to the delivery of this letter, Plaintiffs only allege that Sherrie Versher attempted to meet with Principal Bomchill to obtain permission to pass out brownies. From the facts alleged, it does not appear that Sherrie Versher has a constitutional right to pass out brownies; therefore, Mr. Beasley's letter could not be for the purpose of retaliating against Ms. Versher for exercising her constitutional rights.

Plaintiffs further allege that Ms. Versher met with Principal Bomchill on January 16, 2004, and Principal Bomchill informed her that Stephanie would not be allowed to distribute her a pencil bearing the words "Jesus loves me this I know for the Bible tells me so," but that Stephanie would be able to distribute a pencil with the word "Moon"

written on it. While exiting the office after this meeting with Principal Bomchill, Ms. Versher "thought aloud to herself "Satan is in the building.' " After this occurrence, Mr. Beasley followed Ms. Versher to Stephanie's half birthday party and watched her from a distance. At the conclusion of the party, Ms. Versher walked Stephanie to her locker, then she proceeded down another hallway of the building. Mr. Beasley followed her down the hall and upon Ms. Versher's inquiry as to why he was following her, Mr. Beasley replied that he was escorting her out of the building and that the authorities had been called. Mr. Beasley provides security for PISD, and it appears that after Ms. Versher had audibly uttered "Satan is in the Building" and continued to roam the halls of the elementary school after her daughter's half birthday was completed, Mr. Beasley would be acting within his authority to ask her to leave the building. For the safety of the students, adults should not be allowed to roam through the halls of an elementary school without permission from the school administration. Accordingly, Mr. Beasely did not violate Sherrie Verhser's constitutional rights by instructing her to leave the building at the conclusion of the half birthday party.

Finally, Plaintiffs appear to allege that Mr. Beasley abridged Stephanie Versher's First Amendment rights by prohibiting her from passing out her "Jesus love me" pencils after school hours on school property. Plaintiffs allege that Ms. Bomchill took away a pencil that Stephanie had distributed to a friend, informed Stephanie that she was in violation of PISD policy, and stated that Stephanie was not allowed to distribute religious pencils while

on school property. Plaintiffs then allege that Bomchill and Beasley approached Sherrie Versher and stated that if Stephanie tried to distribute Christian tickets or "Jesus" pencils again, she would be kicked out of school. The court is of the opinion that this does not rise to the level of a constitutional violation on the part of Mr. Beasley. Mr. Beasley did not actually prohibit Stephanie from distributing her pencils, and the Second Amended Complaint is vague as to who actually told Sherrie Versher that her daughter would be expelled if she continued to distribute religious tickets and "Jesus" pencils. Further, when qualified immunity is asserted, Plaintiffs are required to specifically plead the facts establishing the right to recover. *Shultea v. Wood*, 47 F.3d at 1430. Plaintiffs have simply failed to allege with sufficient specificity that Beasley prevented Versher or her daughter from distributing religious materials. The court finds that, even when viewing the Second Amended Complaint in the light most favorable to the Plaintiffs, they have failed to meet their burden for establishing the inapplicability of the defense of qualified immunity with respect to Mr. Beasley because Plaintiffs have failed to allege a constitutional violation. Accordingly, the Individual Defendants Motion to Dismiss on the Basis of Qualified Immunity should be granted with respect to Mr. Beasley.

6. Carole Greisdorf, Assistant Superintendent of Plano Independent School District

The court must first determine whether Plaintiffs have alleged a constitutional violation on

the part of Ms. Greisdorf. In December of 2003, Doug Morgan contacted Ms. Greisdorf to inquire about the student to student distribution of religious material. Ms. Greisdorf suggested that Doug Morgan set up a meeting with Principal Swanson to discuss the matter. After Doug Morgan met with Principal Swanson, he emailed Ms. Greisdorf about his conversation with Principal Swanson. Doug Morgan also asked whether Jonathan Morgan could distribute his "The Legend of the Candy Cane" bookmark gifts. Ms. Greisdorf responded that Principal Swanson's interpretation of the policy was correct and that no student could distribute religious viewpoint gifts while on school property. Ms. Greisdorf stated that Jonathan Morgan could only disseminate his information by placing it on the information table or by distributing it off campus. Two days later, Doug Morgan and Jonathan Morgan took Jonathan's goodie bags that contained "The Legend of the Candy Cane" bookmark gifts to school. Plaintiffs do not allege that Ms. Greisdorf prohibited or prevented Jonathan Morgan from distributing his religious viewpoint gifts. In fact, when taking the facts as Plaintiff alleges them to be true, Ms. Greisdorf's statements did not deter Jonathan Morgan at all from bringing his religious viewpoint gifts to school for distribution. As a result, Plaintiffs have failed to plead facts establishing that Ms. Greisdorf violated the constitutional rights of Jonathan Morgan.

Plaintiffs also allege that in May of 2003, after Principal Long and Ms. Snyder had prohibited Kevin Shell from distributing tickets to religious events at school, Sunny Shell asked Ms. Greisdorf to provide the correct interpretation and application of

the PISD policy regarding announcing and distributing materials from one student to another. Ms. Greisdorf allegedly stated that under PISD policy, the Shells could not announce or offer religious materials or religious information to another student at any time while on school property. Plaintiffs do not allege that Ms. Greisdorf actually prohibited Kevin and Michael Shell from passing out tickets to religious events. Instead, Plaintiffs simply allege that Sunny Shell contacted Ms. Greisdorf after the distribution had already been prohibited by Principal Long and Ms. Snyder. Plaintiffs have simply failed to allege a constitutional violation by Ms. Greisdorf with respect to Kevin and Michael Shell.

Sunny Shell again contacted Ms. Greisdorf in 2004 to inquire about Kevin and Michael Shell's distribution of Harvest Rally tickets. Harvest Rally was an event sponsored by Prestonwood Baptist Church. Ms. Greisdorf responded by referring Sunny Shell to policy FNAA (LOCAL) and directed her to contact her school principal. Again, Plaintiffs have failed to allege that Ms. Greisdorf prohibited the distribution of religious viewpoint tickets.

Because Plaintiffs have not alleged facts that would establish that Ms. Greisdorf violated the constitutional rights of any of the plaintiffs, the Individual Defendants' Motion to Dismiss on the Basis of Qualified Immunity should be granted with respect to Carole Greisdorf.

Establishment Clause Considerations

The Individual Defendants also argue that the contours of the law were not clearly established

because the distribution in question raises potential Establishment Clause violations on the part of PISD employees. In support of their argument, the Individual Defendants rely on *Bell v. Little Axe Independent School District*, 766 F.2d 1391 (10th Cir. 1985). In Bell, teachers were initially supervising and participating in religiously-oriented meetings involving students and non-students immediately before school. *Id.* at 1397. Eventually, teachers were disallowed from participating, but one teacher was required to monitor the student-led activity. The Tenth Circuit found it significant that the teachers had participated in the meetings at one time when finding that the presence of even one teacher produced the same appearance of school authorization or approval. *Id.* at 1405.

While this case may be instructive, it is not binding authority, and the court finds that it is not applicable to the facts as alleged by Plaintiffs. Plaintiffs allege that students were prohibited from distributing religious viewpoint material to other students, not only during instructional times, but at all times while on school property. Jonathan Morgan did seek to distribute his religious gift in the classroom during a Winter Break party, but he sought to distribute it during a party in a closed bag bearing a sticker that read: "To [classmate's name] From: Jonathan Morgan." Taking the facts as Plaintiffs have alleged them to be true, Establishment Clause concerns do not muddy the waters as to the clearly established law in this circuit prohibiting viewpoint discrimination.

CONCLUSION

For the foregoing reasons, the Individual Defendants' Motion to Dismiss on the Basis of Qualified Immunity should be Denied with respect to Lisa Long in her individual capacity, Suzie Snyder in her individual capacity and Lynn Swanson in her individual capacity. The Individual Defendants' Motion to Dismiss on the Basis of Qualified Immunity should be Granted with respect to Dr. Doug Otto in his individual capacity, John Beasley in his individual capacity and Carole Greisdorf in her individual capacity.

RECOMMENDATION

Based upon the foregoing, it is the Court's recommendation that Individual Defendants' Motion to Dismiss Based on Qualified Immunity [Doc. No. 30] should be GRANTED in PART and DENIED in PART.

Within ten (10) days after receipt of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C.A. § 636(b)(1)(C).

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days after service shall bar an aggrieved party from de novo review by the district court of the proposed findings and recommendations and from appellate review of factual findings accepted or adopted by the district court except on grounds of plain error or manifest injustice. *Thomas v. Arn*, 474 U.S. 140, 148, 106 S.Ct. 466, 88 L.Ed.2d

435 (1985); *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988).

Appendix G

PLANO INDEPENDENT SCHOOL DISTRICT POLICY 043190 [FNAA-LOCAL]

STUDENT EXPRESSION: DISTRIBUTION OF NONSCHOOL LITERATURE

Issued October 20, 2003
Adopted October 21, 2003

PRIOR REVIEW

For purposes of this policy, "distribution" means circulation of any written material, tapes, or other media over which the school does not exercise control and that is intended for dissemination to students.

The District's classrooms during the school day are provided for the limited purpose of delivering instruction to students in the course and subjects in which they are enrolled. Hallways in school buildings are provided for the limited purpose of facilitating the movement of students between classes and allowing access to assigned lockers. Classrooms and hallways shall not be used for the distribution of any materials over which the school does not exercise control.

Each school campus shall designate an area where materials that have been approved for distribution by students in accordance with this policy may be made available or distributed. Campus principals may develop reasonable time, place, and manner restrictions regarding the distribution of materials at designated areas.

All written material over which the school does not exercise control and that is intended for distribution to students shall be submitted to the building principal or designee for prior review according to the following procedures:

1. In order to be considered for distribution, materials shall include the name of the organization or individual sponsoring the distribution.
2. Using the standards below at LIMITATIONS ON CONTENT, the principal or designee shall approve or reject submitted material within three school days of the time the material is received.
3. The student may appeal the principal's decision in accordance with FNG(LOCAL), beginning at Level Two.

Students who fail to follow these procedures may be disciplined in accordance with the FO series and the Student Code of Conduct.

LIMITATIONS ON CONTENT

Nonschool materials shall not be distributed if:

1. The materials are obscene, vulgar, or otherwise inappropriate for the age and maturity of the audience.
2. The materials endorse actions endangering the health or safety of students.
3. The distribution of such materials would violate the intellectual property rights, privacy rights, or other rights of another person.

4. The materials contain defamatory statements about public figures or others.

5. The materials criticize Board members or school officials or advocate violation of school rules and fall within the standard described at LIMITATIONS ON EXPRESSION at FNAA (LEGAL).

6. The materials advocate imminent lawless or disruptive action and are likely to incite or produce such action.

7. The materials include hate literature that scurrilously attacks ethnic, religious, or racist groups, and similar publications aimed at creating hostility and violence if they fall within the standard described at LIMITATIONS ON EXPRESSION at FNAA(LEGAL).

For distribution of nonschool literature by nonstudents, see GKD.

PLANO INDEPENDENT SCHOOL DISTRICT POLICY 043190 [FNAA-LOCAL]

STUDENT EXPRESSION: DISTRIBUTION OF NONSCHOOL LITERATURE

Issued April 4, 2005
Readopted Nov. 1, 2005

DEFINITIONS

For purposes of this policy:

1. "Classroom" is defined as any location designated for providing and/or facilitating: student instruction; student education; achievement of curricular objectives; achievement of state-mandated learning requirements; school-sponsored extracurricular activities; and/or school-sponsored programming for students. In addition to traditional classrooms, the term "classroom" includes, but is not limited to, school campus gymnasiums, auditoriums, cafeterias, hallways, and outdoor facilities.
2. "Distribution" means circulation of any materials, as defined herein.
3. "Materials" are defined as writings, items, objects, articles or other materials.
4. "School hours" are defined as the operational hours for a particular facility when students are receiving educational instruction, participating in or attending extracurricular activities, or otherwise being involved in educational/curricular programming.

5. Elementary, middle, and secondary campuses have different distribution policies and guidelines due to the age/maturity of students and the highly structured learning environment of elementary campuses. "Elementary" campuses are defined as campuses designated for students up to fifth grade. "Middle" and "secondary" campuses are defined as campuses designated for students from sixth grade through twelfth grade.

DISTRIBUTION ON ELEMENTARY CAMPUSES BY STUDENTS

Elementary campuses have restrictions that are narrowly tailored to meet the District's legitimate concerns regarding providing instruction, providing education, maintaining discipline, and/or achieving curricular objectives and/or state-mandated learning requirements. The following regulations apply to the distribution of materials between elementary students while on the elementary campus, subject to the restrictions identified in LIMITATIONS ON CONTENT herein.

1. Students may distribute materials 30 minutes before school hours and 30 minutes after school hours at any entrance or exit to the school and at any "gathering area(s)" approved by the principal, the location of distribution in each of these areas to be designated by the principal.
2. Distribution of materials is not permitted in the classroom during school hours with the exception during the three annual parties designated by the District.
3. District elementary school hallways during school hours are provided for the limited purpose

of facilitating the safe, organized, and structured movement of students between classes and allowing access to assigned lockers for providing and/or facilitating: student instruction; student education; achievement of curricular objectives; achievement of state-mandated learning requirements; school-sponsored extracurricular activities; and/or school-sponsored programming for students. Due to this limited purpose and the financial costs and safety/security concerns associated with litter and/or trash in the hallways, students may not distribute materials in elementary school hallways during school hours.

4. District elementary school cafeterias, during designated meal periods, are provided for the limited purpose of providing students meals and/or other nutrition and for delivering instruction to students with regard to nutrition, time management, manners, responsibility, and group discipline. Due to this limited purpose and the financial costs and safety/security concerns associated with litter and/or trash in the cafeteria, students may not distribute materials in elementary school cafeterias during designated meal periods.
5. Students may distribute materials during designated recess periods.
6. Students may leave materials on the "distribution table" and/or any other such designated area so others may obtain a copy. Each school campus principal shall designate an area where materials may be made available or distributed.

7. Students may distribute materials during the three annual parties designated by the District.
8. Campus principals may develop other reasonable time, place, and manner restrictions regarding the distribution of materials at areas designated by the principal.
9. Students may distribute materials in areas not addressed by this policy subject to the reasonable time, place, and manner restrictions developed by the campus principal and the guidelines outlined herein.

Students are expected to comply with all applicable District and/or campus behavior rules, policies and all educational/curricular goals when distributing materials on District property. Copies of applicable District and campus rules and/or policies are available at each campus.

Students who distribute materials on District property at any time shall be responsible for cleaning up such materials left on District property.

Students violating any provision of this policy may be subject to discipline including, but not limited to, prohibition of further distribution under this policy.

LIMITATIONS ON CONTENT

Material shall not be distributed if:

1. The materials are obscene, vulgar, or otherwise inappropriate for the age and maturity of the audience.

2. The materials endorse actions endangering the health or safety of students.

3. The materials advocate violation of school rules and fall within the standard described at LIMITATIONS ON EXPRESSION at FNAA (LEGAL).

4. The materials advocate imminent lawless or disruptive action and are likely to incite or produce such action.

5. The materials include hate literature that scurrilously attacks ethnic, religious, or racial groups and similar publications aimed at creating hostility and violence if they fall within the standard described at LIMITATIONS ON EXPRESSION at FNAA(LEGAL).

6. There is reasonable cause to believe that distribution of the materials would result in material and substantial interference with any school education and/or curricular related activity or that blocks or impedes the safe flow of traffic within hallways and entrance or exit ways of the school.

DISTRIBUTION ON MIDDLE AND SECONDARY CAMPUSES BY STUDENTS

Middle school and secondary school campuses have restrictions that are narrowly tailored to meet the District's legitimate concerns regarding providing instruction, providing education, maintaining discipline, and/or achieving curricular objectives and/or state-mandated learning requirements. The following guidelines apply to distribution of materials between middle and secondary school students while on middle and secondary campuses, subject to the restrictions identified in LIMITATIONS ON CONTENT herein.

1. Subject to the restrictions herein, students may distribute materials 30 minutes before school hours and 30 minutes after school hours at any entrance or exit to the school and at any "gathering area(s)" approved by the principal, the location of distribution in each of these areas shall be designated by the principal.
2. Distribution of materials is not permitted in the classrooms during school hours.
3. Middle and secondary students may distribute materials in middle and secondary school hallways during noninstructional times during school hours.
4. Middle and secondary students may distribute materials in middle and secondary campus cafeterias during designated lunch periods and noninstructional time.
5. Students may leave materials on the "distribution table" and/or any other designated area so that others may obtain a copy. Each school campus principal shall designate an area where materials that have been approved for distribution by students in accordance with this policy may be made available or distributed.
6. Campus principals may develop other reasonable time, place, and manner restrictions regarding the distribution of materials at areas designated by the principal.
7. Students may distribute materials in areas not addressed by this policy, subject to the reasonable time, place, and manner restrictions developed by the campus principal and the guidelines outlined herein.

Students are expected to comply with all applicable District and/or campus behavior rules, policies, and all educational/curricular goals when distributing materials on District property. Copies of applicable District and campus rules and/or policies are available at each campus.

Students who distribute materials on District property at any time shall be responsible for cleaning up such materials left on District property.

Students violating any provision of this policy may be subject to discipline including, but not limited to, prohibition of further distribution under this policy.

LIMITATIONS ON CONTENT

Materials shall not be distributed if:

1. The materials are obscene, vulgar, or otherwise inappropriate for the age and maturity of the audience.
2. The materials endorse actions endangering the health or safety of students.
3. The materials advocate violation of school rules and fall within the standard described at LIMITATIONS ON EXPRESSION at FNAA (LEGAL).
4. The materials advocate imminent lawless or disruptive action and are likely to incite or produce such action.
5. The materials include hate literature that scurrilously attacks ethnic, religious, or racial groups and similar publications aimed at creating hostility and violence if they fall within

the standard described at LIMITATIONS ON EXPRESSION at FNAA(LEGAL).

6. There is reasonable cause to believe that distribution of the materials would result in material and substantial interference with any school education and/or curricular related activity or that blocks or impedes the safe flow of traffic within hallways and entrance or exit ways of the school.

PLANO INDEPENDENT SCHOOL DISTRICT PREAMBLE TO POLICY 043190 — *STUDENT EXPRESSION: DISTRIBUTION OF NONSCHOOL LITERATURE*

Issued Nov. 1, 2005

PREAMBLE

WHEREAS, the Board of Trustees finds it is the mission of the District to teach and train its students state and federally mandated curriculum and learning requirements, social skills and values, order, discipline and respect for authority and each other; and

WHEREAS, the Board of Trustees finds that without first establishing discipline and maintaining order at the schools, teachers cannot begin to educate their students; and

WHEREAS, the Board of Trustees finds the District has a limited amount of time available to teach its students the above; and

WHEREAS, the Board of Trustees finds that students should have an opportunity to distribute non-school materials in a manner that does not disrupt the educational process, the order and discipline of the schools and/or the operation of the schools; and

WHEREAS, the provisions of Policies FNAA(LOCAL) and GKD(LOCAL) are intended to regulate the time, place and manner of non-school materials during times and places when the District is attempting to operate the schools and teach its students the above which the Board of Trustees finds to be reasonable and content neutral; and

WHEREAS, the Board of Trustees finds the provisions of Policies FNAA(LOCAL) and GKD(LOCAL) are intended to decrease distractions, to decrease disruption, to increase the time available and dedicated to learning, and to improve the educational process, environment, safety and order at District schools and not invade or collide with the rights of others; and

WHEREAS, the Board of Trustees finds the provisions of Policies FNAA(LOCAL) and GKD(LOCAL) relating to elementary schools are also intended to facilitate the safe, organized and structured movements of students between classes and at lunch, as well as to reduce littering; and

WHEREAS, the Board of Trustees finds that, from an educational perspective, the distribution of non-school materials during times and places when the District is attempting to teach students is both distracting and a material and substantial disruption to the educational process and environment and to the order and discipline of the schools; and

WHEREAS, the Board of Trustees finds the provisions of Policies FNAA(LOCAL) and GKD(LOCAL) leave open alternative forms of communication of non-school materials, such as alternative times and places to distribute such materials, non-disruptive oral speech, and "distribution tables"; and

WHEREAS, the Board of Trustees acknowledges receipt of testimony from educators, professionals and others and various written materials, including, but not limited to, studies, research, evaluations,

and other findings that overwhelming support the adoption of Polices FNAA(LOCAL) and GKD(LOCAL); and

WHEREAS, the Board of Trustees believes that, to better improve the educational process, environment, safety and order at District schools, it is necessary to adopt the reasonable time, place and manner regulations in Policies FNAA(LOCAL) and GKD(LOCAL):

The Board of Trustees hereby approves and adopts the above findings to support the passage of and hereby adopts Policies FNAA(LOCAL) and GKD(LOCAL).

No. 09-1131

Supreme Court, U.S.
FILED
JUN 7 - 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DOUG MORGAN, ET AL.,

Petitioners,

v.

PLANO INDEPENDENT SCHOOL DISTRICT, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF LYNN SWANSON AND JACKIE BOMCHILL TO PETITION FOR WRIT OF CERTIORARI

THOMAS P. BRANDT
Counsel of Record

JOSHUA A. SKINNER
FANNING HARPER MARTINSON
BRANDT & KUTCHIN, P.C.
Two Energy Square
4849 Greenville Ave., Suite 1300
Dallas, Texas 75206
tbrandt@fhmbk.com
(214) 369-1300

Attorneys for Respondents
Lynn Swanson and Jackie Bomchill

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether public school students are provided greater free speech rights to distribute literature in public schools during the school day than this Court generally permits to adult citizens in public forums.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

SUMMARY 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 6

I. The Petition Misrepresents the Facts and Is Procedurally Premature 6

A. No Evidence of Religious or Viewpoint Discrimination Exists in the Summary Judgment Record 6

B. The Procedural Posture of the Case Counsels Against Granting the Petition 8

II. The Petition Does Not Present an Important Legal Issue 10

A. Petitioners Propose Granting Greater First Amendment Rights to Public School Students Than Are Generally Provided to Adult Citizens in Public Forums 10

B. The Petition Does Not Reach the First Amendment Issue that Actually Exists in this Litigation 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Brandt v. Bd. of Educ. of City of Chicago, 480 F.3d 460 (7th Cir.), *cert. denied*, 552 U.S. 976 (2007) 12

Heffron v. Int'l Soc'y of Krishna Consciousness, 452 U.S. 640 (1981) 1, 10

Marks v. United States, 430 U.S. 188 (1977) 11

Morse v. Frederick, 439 U.S. 1114 (2007) 11

Teague v. Lane, 489 U.S. 288 (1989) 9

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 504 (1969) 10, 11, 12

United States v. O'Brien, 391 U.S. 367 (1968) 4, 10, 12

Walker-Serrano v. Leonard, 325 F.3d 412 (3d Cir. 2003) 11

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I 10, 11, 12

STATUTES

28 U.S.C. § 636 4

RULES

FED. R. CIV. P. 54 9

FED. R. CIV. P. 56 7

SUP. CT. R. 15.4 11

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Jennifer L. Specht, Note, *Younger Students, Different Rights? Examining the Standard for Student-Initiated Religious Free Speech in Elementary Schools*, 91 CORNELL L. REV. 1313 (2006) 12

Jay Alan Sekulow et al., *Proposed Guidelines for Student Religious Speech and Observance in Public Schools*, 46 MERCER L. REV. 1017 (1995) 12

SUMMARY

In keeping with this Court's holding in *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981), the United States Court of Appeals for the Fifth Circuit upheld a content-neutral, time-place-manner restriction on the distribution of written materials. Petitioners and their amici, however, try to obfuscate the issues present in this appeal by relying on mere allegations of religious and viewpoint discrimination when there is no evidence in the summary judgment record to support the allegations and when those allegations have nothing to do with the issues addressed in the summary judgment record, viz., the facial constitutionality of a school district's written policies.

This is an interlocutory appeal of a decision regarding Petitioners' facial challenge to the constitutionality of Plano Independent School District's ("the School District") policies regulating the time, place and manner of student distribution of non-curricular materials during the school day. No discovery was conducted regarding Petitioners' allegations of religious and viewpoint discrimination and no evidence was included with the summary judgment record to substantiate those allegations. Petitioners' request for review is improperly based on mere allegations, which are unsupported by the summary judgment record and which were never decided below. As the Court of Appeals noted, granting interlocutory review of Petitioners' facial challenge was inadvisable in light of the remaining disputes regarding Petitioners'

as-applied (religious and viewpoint discrimination) claims. The procedural posture of the case counsels strongly against review at this time.

The Court of Appeals' decision is consistent with this Court's approval of time-place-manner restrictions on literature distribution and, as a result, should not be disturbed. To the extent that this litigation raises issues that might warrant review by this Court, this Court would be well advised to wait for a more appropriate time both in terms of the development of the record and the procedural posture of the case.

The petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

This is an appeal from a decision regarding Petitioners' and Plano Independent School District's ("the School District") cross-motions for summary judgment on the facial constitutionality of the School District's district-wide policy imposing time, place and manner restrictions on the distribution of non-curricular materials at school during the school day by students. There is no evidence of religious discrimination or viewpoint discrimination in the summary judgment record. Petitioners allege religious discrimination and viewpoint discrimination in their complaint, but those allegations are not part of the summary judgment record. *See, e.g.*, R.908 [Plaintiffs'

Motion and Brief in Support of Plaintiffs' Motion for Partial Summary Judgment (Facial Challenge to PISD Policies)] ("This summary judgment motion does not seek summary judgment on the *application* of these policies to the plaintiffs" (emphasis in original)).

Petitioners brought suit against the School District and various school officials, including Respondents Principal Lynn Swanson ("Swanson") and former Principal Jackie Bomchill ("Bomchill"), in December of 2004. Pet. App. 33. In 2005, after Petitioners brought suit, the School District amended its policy and expanded students' opportunities to distribute non-curricular materials at school. Pet. App. 33-38.[1] Petitioners allege that both the earlier policy and the amended policy are facially unconstitutional. Pet. App. 38. In addition, Petitioners allege that the earlier policy was applied in an unconstitutional manner. R.1536 [Second Am. Compl. ¶1.16]. Specifically, Petitioners allege that school officials practiced religious or viewpoint discrimination against Petitioners in the application of the earlier policy. Pet. 5. Petitioners have not alleged any religious or viewpoint discrimination in the application of the amended policy. *Cf.* R.2812.

---

[1] For the sake of consistency, Respondents follow Petitioners in referring to the policy in place before 2005 as the earlier policy and the later policy as the amended policy. *See* Pet. 10.

Pending resolution of Petitioners' and the School District's cross-motions for summary judgment on the facial constitutionality of the earlier and amended policies, no discovery on any issues, including Petitioners' religious and viewpoint discrimination allegations, has been conducted. The magistrate judge issued a report recommending that the district court deny Petitioners' motion for summary judgment and grant the School District's motion. Pet. App. 24; 28 U.S.C. § 636(b)(1)(B). The magistrate concluded that Petitioners' challenge to the earlier policy was moot because it had been amended and that the amended policy should be upheld under *United States v. O'Brien*, 391 U.S. 367 (1968). Pet. App. 24-59. Petitioners filed objections to the magistrate's report. R.2844; 28 U.S.C. 636(b). The district court affirmed the magistrate's report and recommendations, except as to one provision of the amended policy, which the district court held violated the First Amendment. Pet. App. 17-20; 28 U.S.C. § 636(b).

Over the objection of Respondents Swanson and Bomchill, the district court certified Petitioners' facial challenge to the School District's policies for immediate appeal to the United States Court of Appeals for the Fifth Circuit. Pet. App. 21-23; R.3780-81. The Court of Appeals, while noting that the district court should not have certified the case for interlocutory appeal while qualified immunity motions to dismiss are pending, affirmed in part and reversed in part the decision of the district court. Pet. App. 14 and 4 n.5. The Court of Appeals held that the earlier policy was

not moot and remanded that portion of the case to the district court for consideration on its merits. Pet. App. 13-14. The Court of Appeals also upheld the amended policy, holding that it is a reasonable time, place and manner restriction. Pet. App. 10-13.

The earlier policy has been remanded to the district court, Petitioners and the School District have provided additional briefing on the constitutionality of the earlier policy, and the magistrate judge has issued a new report, recommending that the district court deny summary judgment on the earlier policy until the parties have had the opportunity to develop the evidentiary record. Still, five and a half years into this litigation, no discovery has been conducted and no efforts have been made to develop an evidentiary record that would substantiate Petitioners' allegations of religious and viewpoint discrimination. Nevertheless, Petitioners repeatedly claim in their Petition that religious and viewpoint discrimination *actually occurred* in the School District under the earlier policy. *See, e.g.*, Pet. 5-8. This is a serious, implicit misrepresentation of the record. The summary judgment record contains *no evidence* to support Petitioners' allegations, which are implicitly and improperly presented to this Court as established facts. Moreover, in addition to implicitly misrepresenting allegations as if they were established facts, Petitioners have improperly and implicitly misrepresented these mere allegations as relevant facts when the truth is that the allegations of religious and viewpoint discrimination have nothing

allegations or denials in its own pleading"). Instead, Petitioners attempt to raise these new arguments regarding religious and viewpoint discrimination on appeal without providing the defendants any opportunity to conduct discovery on Petitioners' allegations or offer any evidence to refute their claims.

Petitioners attempt to rely on unverified allegations that are not part of the summary judgment evidentiary record appears to be a blatant attempt to inflame this Court to grant review on a case that is otherwise undeserving of consideration.[3] This Court should deny the petition for writ of certiorari.

B. The Procedural Posture of the Case Counsels Against Granting the Petition.

Petitioners request for review should not be granted because not all of the facts that Petitioners believe are essential to determination of the case are properly before this Court. Petitioners purport to seek review of allegations of religious and viewpoint discrimination that have not been adjudicated and are not part of this appeal. This appeal is an appeal

---

[3] To that end, Petitioners have included in their appendix a report from the magistrate judge that has no bearing on this appeal. Appendix F in Petitioners' appendix is a report and recommendation from the magistrate judge on a motion to dismiss filed by some of the school official defendants. Pet. App 60. This appeal does not seek review of the magistrate's report and recommendation on the school officials' motion to dismiss. Pet. App. 21.

from an interlocutory decision on a facial challenge and includes no evidence of religious or viewpoint discrimination.

This appeal results from a certification by the district court pursuant to Federal Rule of Civil Procedure 54(b). Pet. App. 21 [Order Granting Motion to Certify Court Order as Final]. However, as the Court of Appeals noted, the justification for granting Rule 54(b) certification is dubious in light of the pending as-applied challenges and assertions of qualified immunity.

> While deferring to the judgment of the district court, we remain dubitante over the efficiency of separating the claims into separate appeals, an effort further complicated by the later denial of qualified immunity to individual defendants. The effort to confect an efficient appeal is commendable in concept although here perverse in execution.

Pet. App. 4 n.5. Petitioners clearly believe that their allegations of religious and viewpoint discrimination are central to their case, but those allegations will not be before this Court if it grants review. There is no procedural reason why this Court must grant review of this case at this time in order to address the legal issues raised by Petitioners. *Cf. Teague v. Lane*, 489 U.S. 288, 296 (1989) ("law of the case" doctrine does not apply to this Court's post-trial review of pre-trial decisions by court of appeals). Instead, to the extent the Court believes that issues argued by Petitioners

should be reviewed, the Court should wait for an appeal that properly presents those issues.

II. THE PETITION DOES NOT PRESENT AN IMPORTANT LEGAL ISSUE.

A. Petitioners Propose Granting Greater First Amendment Rights to Public School Students Than Are Generally Provided to Adult Citizens in Public Forums.

"The First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981) (upholding time, place and manner restrictions on leafleting in a public forum). In *Heffron*, this Court upheld a restriction on the distribution of literature that limited distribution activities to one location within the State Fair grounds. *Id.* at 647-48. Petitioners, however, propose that this Court should adopt a heightened standard for public schools. Petitioners propose that, instead of applying the time-place-manner or *O'Brien* test to content-neutral regulations of the distribution of non-curricular materials in public schools, this Court should apply the heightened "material and substantial disruption" standard set forth in *Tinker v. Des Moines Independent Community School District*, 393

U.S. 504 (1969).[4] Petitioners have not, however, explained why public school students should have greater free speech protections than this Court provides to adult citizens in public forums.

B. The Petition Does Not Reach the First Amendment Issue that Actually Exists in this Litigation.

This litigation raises an important First Amendment issue, but it is one that is not raised by Petitioners. Various courts of appeals and commentators, including counsel of record for amicus curiae The American Center for Law and Justice, have noted the lack of clarity in this Court's jurisprudence regarding the application of the First Amendment in elementary schools. *See, e.g., Walker-Serrano v. Leonard*, 325 F.3d 412, 417-18 (3d Cir. 2003) ("In any event, if third graders enjoy rights under *Tinker*, those rights will necessarily be very limited. Elementary school officials will undoubtedly be able

---

[4] For purposes of preserving their argument under Supreme Court Rule 15.4, Respondents note that Justice Alito's concurring opinion in *Morse v. Frederick*, 439 U.S. 1114 (2007), is not the controlling opinion. Petitioners cite to *Marks v. United States*, 430 U.S. 188, 193 (1977), for the proposition that the opinion with the narrowest ground is controlling. Petitioners' reliance on *Marks* is misplaced because *Marks* addresses decisions in which no one opinion garnered "the assent of five justices" *Id.* The majority opinion in *Morse* had the assent of five justices. In addition, Justice Thomas concurred in the result on even broader grounds.

to regulate much – perhaps most – of the speech that is protected in higher grades."); *Brandt v. Bd. of Educ. of City of Chicago*, 480 F.3d 460, 466 (7th Cir.) ("We have our doubts whether the constitutional privilege to engage in protest demonstrations in the name of free speech extends to eighth graders."), *cert. denied*, 552 U.S. 976 (2007).[5] Both Petitioners and the School District have largely ignored the difference in the application of the First Amendment in the elementary versus secondary context since that issue has little bearing on the evaluation of the district-wide policy under *Tinker* or *United States v. O'Brien*, 391 U.S. 367 (1968). However, all of Petitioners' as-applied challenges involve elementary school students and, if properly raised in an appeal, would present a more worthy question and record to review.

---

[5] *See also* Jennifer L. Specht, Note, *Younger Students, Different Rights? Examining the Standard for Student-Initiated Religious Free Speech in Elementary Schools*, 91 CORNELL L. REV. 1313, 1331-1332 (2006) ("*Tinker*'s failure to address the age issue should not be seen as a mere omission, but as an exclusion of its application to elementary students."); Jay Alan Sekulow et al., *Proposed Guidelines for Student Religious Speech and Observance in Public Schools*, 46 MERCER L. REV. 1017, 1072 (1995) (Noting that "*Tinker* itself dealt with the speech rights of high school and junior high school students [and proposing] guidelines [to] extend the *Tinker* standard to elementary schools.").

Supreme Court, U.S.
FILED
JUN 7 - 2010
OFFICE OF THE CLERK

No. 09-1131

IN THE

Supreme Court of the United States

DOUG MORGAN, ET AL.,
Petitioners,

v.

PLANO INDEPENDENT SCHOOL DISTRICT, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT PLANO INDEPENDENT SCHOOL DISTRICT

RICHARD M. ABERNATHY
CHARLES J. CRAWFORD
ABERNATHY, ROEDER,
BOYD & JOPLIN, P.C.
1700 Redbud Blvd.
Suite 300
McKinney, Texas 75069
(214) 544-4000

GREGORY S. COLEMAN
Counsel of Record
CHRISTIAN J. WARD
RICHARD B. FARRER
YETTER, WARDEN &
COLEMAN, L.L.P.
221 West Sixth Street
Suite 750
Austin, Texas 78701
(512) 533-0150
gcoleman@ywcllp.com

Counsel for Respondent Plano Independent School District

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the Fifth Circuit properly upheld, as facially constitutional under long-established First Amendment precedent, a school district's content- and viewpoint-neutral policy that creates reasonable time, place, and manner restrictions on distribution of noncurricular materials during instructional time but expressly permits students to distribute any constitutionally protected written materials they desire at many opportunities before, during, and after the school day.

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities iii

Opinions Below 4

Statement of the Case 4

Reasons for Denying the Petition 13

I. There Is No Conflict Among the Circuits About Evaluating Time, Place, and Manner Regulations in Schools 14

A. This Case Does Not Involve a Direct Prohibition on Speech 14

B. No Circuit Has Applied *Tinker* to Content-Neutral Time, Place, and Manner Regulation of Student Distribution of Materials 20

II. This Case Is a Poor Vehicle for Addressing the Question Presented 24

Conclusion 28

TABLE OF AUTHORITIES

Page(s)

CASES

American Constr. Co. v. *Jacksonville, T. & K. W. R. Co.*,
148 U.S. 372 (1893) 25

Bar-Navon v. *Brevard County Sch. Board*,
290 Fed. Appx. 273 (CA11 2008) 23

Bethel Sch. Dist. No. 403 v. *Fraser*,
478 U.S. 675 (1986) 15

Blau v. *Fort Thomas Pub. Sch. Dist.*,
401 F.3d 381 (CA6 2005) 23

Bhd. of Locomotive Firemen & Enginemen v. *Bangor & Aroostook R.R.*,
389 U.S. 327 (1967) 25

Canady v. *Bossier Parish Sch. Board*,
240 F.3d 437 (CA5 2001) 22, 23

Clark v. *Cmty. for Creative Non-Violence*,
468 U.S. 288 (1984) 17, 19

Cox v. *Louisiana*,
379 U.S. 536 (1965) 16

Gonzales v. *Carhart*,
550 U.S. 124 (2007) 28

Grayned v. *City of Rockford*,
408 U.S. 104 (1972) 17, 18

Greer v. *Spock*,
424 U.S. 828 (1976) 18

Guiles v. *Marineau*,
461 F.3d 320 (CA2 2006) 21, 23

Hague v. *Comm. for Indus. Org.*,
307 U.S. 496 (1939) 17

TABLE OF AUTHORITIES—Continued

Page(s)

Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*,
240 U.S. 251 (1916) 25

Heffron v. *Int'l Soc. for Krishna Consciousness, Inc.*,
452 U.S. 640 (1981) 11, 16, 18

Hill v. *Colorado*,
530 U.S. 703 (2000) 11, 15, 17

Int'l Soc. for Krishna Consciousness, Inc. v. *Lee*,
505 U.S. 672 (1992) 17

Jacobs v. *Clark County Sch. Dist.*,
526 F.3d 419 (CA9 2008) 23

Linmark Associates, Inc. v. *Willingboro*,
431 U.S. 85 (1977) 20

Lowry v. *Watson Chapel Sch. Dist.*,
540 F.3d 752 (CA8 2008) 21

M.A.L. v. *Kinsland*,
543 F.3d 841 (CA6 2008) 22

Morse v. *Frederick*,
551 U.S. 393 (2007) 11, 15

Newsom v. *Albemarle County Sch. Board*,
354 F.3d 249 (CA4 2003) 21, 23

Nuxoll v. *Indian Prairie Sch. Dist. No. 204*,
523 F.3d 668 (CA7 2008) 21, 22

Palmer v. *Waxahachie Indep. Sch. Dist.*,
130 S.Ct. 1055 (2010) 23

Palmer v. *Waxahachie Indep. Sch. Dist.*,
579 F.3d 502 (CA5 2009) 23

TABLE OF AUTHORITIES—Continued

Page(s)

Perry Educ. Assn. v. *Perry Local Educators' Assn.*,
460 U.S. 37 (1983) 17, 18

Porter v. *Ascension Parish Sch. Board*,
393 F.3d 608 (CA5 2004) 22

Renne v. *Geary*,
501 U.S. 312 (1991) 27

Saxe v. *State Coll. Area Sch. Dist.*,
240 F.3d 200 (CA3 2001) 21

S.G. v. *Sayreville Board of Educ.*,
333 F.3d 417 (CA3 2003) 6

Tinker v. *Des Moines Indep. Cmty. Sch. Dist.*,
393 U.S. 503 (1969) 2, 10, 19

United States v. *Kokinda*,
497 U.S. 720 (1990) 17

United States v. *O'Brien*,
391 U.S. 367 (1968) 19

United States v. *Raines*,
362 U.S. 17 (1960) 27

Virginia Military Inst. v. *United States*,
508 U.S. 946 (1993) 25, 26

Walker-Serrano v. *Leonard*,
325 F.3d 412 (CA3 2003) 21, 22

Ward v. *Rock Against Racism*,
491 U.S. 781 (1989) 17

Washington State Grange v. *Washington State Republican Party*,
552 U.S. 442 (2008) 28

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

Fed. Rule Civ. Proc. 54(b).....26

IN THE

Supreme Court of the United States

No. 09-1131

DOUG MORGAN, ET AL.,
Petitioners,

v.

PLANO INDEPENDENT SCHOOL DISTRICT, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT PLANO INDEPENDENT SCHOOL DISTRICT

No court of appeals has ever held that the U.S. Constitution grants children in school a virtually unfettered right to distribute personal materials in classrooms during instructional time. And this Court's precedents do not remotely suggest the kind of unbalanced and unwise approach to the First Amendment in schools that petitioners espouse. There is simply no conflict among federal courts over the real issues in this case—properly understood—or merit to petitioners' arguments that schoolchildren in school enjoy more expansive First Amendment rights than adults in public forums.

Public schools are charged by their respective States with equipping the next generation to participate as citizens. Education is the core of that challenging mission, but it includes permitting opportunities for children to exercise their constitutional right to free expression. Schools must—and do—strike a careful balance between permitting pupils to express themselves and preserving critical time for meeting instructional goals. No school could strike that balance if, as petitioners urge, the Constitution dictated that they permit every expressive interruption of the instructional process that does not clear the high threshold of substantial and material disruption.

No precedent of this Court, or any circuit court, requires schools to operate under such a disability. It is well established that adults in traditional public forums have expansive rights to freely express their ideas and opinions but may nevertheless be constitutionally subject to reasonable regulation of when, where, and how they can exercise that right. *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), in which the Court limited schools' ability to engage in viewpoint discrimination, does not displace that general First Amendment jurisprudence in schools; it is not and cannot be the case that time, place, and manner regulations applied to schoolchildren are subject to greater scrutiny than those applied to adults in public streets and parks.

Petitioners' problem is not so much that they misread *Tinker*—although they do—but that they misconstrue the nature of this case and of those in which *Tinker* properly applies. The issue that the Fifth Circuit decided and that petitioners attempt to

place before the Court is whether respondent Plano Independent School District's current policy on student distribution of noncurricular materials is facially constitutional. That policy simply does not prohibit *any* content, except that falling within narrowly defined categories of speech like obscenity that are not protected in grade schools. Plano ISD's policy does not prohibit religious speech, notwithstanding the tenor of petitioners' as-applied claims, which are not before the Court but which the petition repeatedly conflates with petitioners' facial challenge. The policy at issue does not regulate the content of speech; it plainly regulates only when, where, and how students may engage in some forms of speech—and it permits them many opportunities to do so. Yet petitioners continually mischaracterize the policy as a prohibition of speech. And every case they cite as a purported example of the correct application of *Tinker* actually involved a prohibition of particular speech, not a time, place, and manner regulation like that at issue in this case.

There is simply no conflict among the federal circuits or between the Fifth Circuit's opinion in this case and the Court's precedent. Petitioners identify no case that applied *Tinker* to a school's content- and viewpoint-neutral policy that *permits* all manner of protected speech, like the policy at issue in this case. Petitioners' inability to discuss their facial challenge without referring to their still unlitigated as-applied claims alleging prohibitions of particular speech further illustrates why this case would not be an appropriate vehicle to clarify any questions that might exist over the scope of *Tinker*. Petitioners' as-applied claims are hotly disputed and have not been adjudicated by any court.

In short, this case presents no genuine issue on which there is any confusion or conflict among the lower courts. The only circuits to consider the constitutionality of content-neutral time, place, and manner regulations in a school materials-distribution policy—petitioners identify only one other than the Fifth Circuit—performed the same analysis and reached the same conclusion. The petition should be denied.

OPINIONS BELOW

The opinion of the Fifth Circuit, Pet. App. 1, is reported at 589 F.3d 740. The Fifth Circuit's order denying rehearing and rehearing en banc is reprinted at Pet. App. 15. The district court's decision denying plaintiffs' motion for summary judgment on the facial constitutionality of the 2005 policy, granting in part Plano ISD's motion for summary judgment on the 2005 policy, and finding moot the 2004 policy's constitutionality, is reprinted at Pet. App. 17 and may be found at 2007 WL 654308. The unreported magistrate's report and recommendation is reprinted at Pet. App. 24. The district court's opinion and order denying the motion of two of the individual defendants for dismissal on qualified immunity grounds is reported at 612 F.Supp.2d 750. The appeal of that order is pending in the Fifth Circuit. *Morgan* v. *Swanson*, No. 09-40373 (CA5, oral argument heard Apr. 7, 2010).

STATEMENT OF THE CASE

Petitioners' appeal involved a challenge to the facial constitutionality of Plano ISD's 2005 policy on student distribution of noncurricular materials. Petitioners' claims regarding the facial constitutionality of a similar previous version of the policy, the 2004 policy, have not been addressed on

the merits by either the district court or the Fifth Circuit. Those claims currently remain before the district court. Similarly, petitioners' other claims, including their as-applied challenges relating to the application of the Plano ISD student-distribution policy, are not before the Court. Those claims are also still pending in the district court. Accordingly, petitioners' unsubstantiated allegations concerning the motivation for or the application of the distribution policies to particular students in particular circumstances have never been tested by a fact finder or adjudicated.[1]

The 2005 student-distribution policy does a great deal to facilitate student expression, and it does not prohibit any constitutionally protected expression, let alone on the basis of its content or viewpoint. See Pet. App. 98-105. The policy generally permits all students to distribute materials 30 minutes before or after school hours, at any school entrance or exit. *Ibid.* It permits students to leave materials on a distribution table or in other designated areas, and it instructs school principals to provide such an area for that purpose. *Ibid.* The policy also allows high school and middle school students to distribute materials during noninstructional time in school hallways and cafeterias, and it permits elementary school children to distribute materials during recess and at three designated school parties. *Ibid.* In sum, the only restriction on middle- and high-school-student distribution is that those students may not

---

[1] Petitioners also lodged claims against several individual defendants. Whether some of those individuals are entitled to qualified immunity is the subject of yet another appeal, which is currently pending in the Fifth Circuit. See *Morgan* v. *Swanson*, No. 09-40373 (CA5, oral argument heard Apr. 7, 2010).

distribute noncurricular materials "in the classroom during school hours." Pet. App. 99. Elementary school children are additionally restricted from distributing noncurricular materials in the cafeteria during designated lunch periods, which are considered instructional time, and in school hallways, which are primarily for safe movement between classrooms. *Id.*, at 99-100.

The policy draws no distinctions based on content or viewpoint expressed, and petitioners have acknowledged that the policy is facially content neutral. See, *e.g.*, Pet. 14 (framing the case as involving the standard applicable to "content- and viewpoint-neutral restrictions on student speech"). The policy does not *prohibit* or *ban*[2] *any* protected speech.[3] The few, narrow prohibitions on student

---

[2] Petitioners' inaccurate rhetoric accuses Plano ISD's policy of outright banning or prohibiting student speech or distribution. See, *e.g.*, Pet. 4, 6-8, 33. Those assertions conflate petitioners' as-applied claims, based on alleged discrete incidents in which students were purportedly prohibited from distributing particular materials, with the facial challenge that is the only claim before the Court. Petitioners discuss those allegations, citing their own pleadings, as though they were established fact. But defendants vigorously dispute the alleged instances of prohibited speech, and no fact discovery as to those allegations has yet taken place, much less have those claims been adjudicated.

[3] Some courts and commentators have questioned whether elementary-school children enjoy the same First Amendment rights while at school as older students. See, *e.g.*, *S.G.* v. *Sayreville Board of Educ.*, 333 F.3d 417, 423 (CA3 2003). Regardless, Plano ISD's 2005 materials-distribution policy affords young children as much or more protection than the First Amendment demands, permitting them the same freedom to distribute constitutionally protected materials it permits to older students.

speech in the policy relate to types or categories of speech, like obscenity, recognized as falling outside the First Amendment's protection in grade schools.[4] Petitioners do not challenge, and have never challenged, those aspects of the policy.

Plano ISD adopted the 2005 policy on April 4, 2005, following a public meeting. The district adopted the policy only after receiving evidence that student distribution of materials like birthday cards, notes, and concert tickets was significantly and negatively affecting the learning environment. See R.1520-1523; see also R.2049-2051, 2053-2055. Nonetheless, a main goal of the 2005 policy is to "allow greater distribution by students and others of all materials, including religious materials by all faiths . . . [and to] create more opportunities for students to exchange materials while remaining non-disruptive to the educational process." R.1459-1460 (Plano ISD Superintendent Doug Otto). Once adopted, the 2005 policy superseded the 2004 policy, which is no longer in effect.

The district's board re-adopted the 2005 policy in November 2005, following a public hearing at which

---

[4] The Fifth Circuit summarized this aspect of the policy as follows:

> "The Policy bans materials that (1) are obscene, vulgar, or otherwise age-inappropriate; (2) endorse actions endangering the health or safety of students; (3) advocate violation of school rules; (4) advocate imminent lawlessness; (5) contain hate speech; and (6) reasonably could result in 'material and substantial interference with any school education and/or curricular related activity or that blocks or impedes the safe flow of traffic within hallways and entrance or exit ways of the school.'" Pet. App. 2-3, n.2.

eleven Plano ISD educators testified about the need for the policy to safeguard the district's core educational mission. Pet. App. 3. At that hearing, the district also received a detailed report from school principal Susan Dantzler as well as various legal authorities. The materials considered by the board at the hearing, and the transcript of the November 2005 hearing, were included in the record in the lower courts. R.1988-2255.

Following the hearing, and in connection with its November 2005 re-adoption of the 2005 policy, the district added a preamble to the 2005 policy. The preamble expresses the district's objectives of protecting the integrity of the educational environment and, at the same time, remaining respectful of students' legitimate desire to communicate on nonschool topics:

> "[T]he Board of Trustees finds the provisions of [the 2005 policy] are intended to decrease distractions, to decrease disruption, to increase the time available and dedicated to learning, and to improve the educational process, environment, safety and order at District schools and not invade or collide with the rights of others. . . .
>
> [T]he Board of Trustees finds that, from an educational perspective, the distribution of non-school materials during times and places when the District is attempting to teach students is both distracting and a material and substantial disruption to the educational process and environment and to the order and discipline of the schools . . . ." Pet. App. 106-108; R.2544-2545.

Petitioners, a group of four families whose children attended Plano ISD schools, filed this

lawsuit asserting a variety of claims, including facial and as-applied challenges to the 2004 and 2005 policies, and naming Plano ISD and six school employees as individual defendants. The case was split into several pieces in the district court. The issue of qualified immunity was separated from the rest of the case. The other claims, including the as-applied challenges, were held in abeyance while the district court addressed only the policies' facial constitutionality. On that issue, respondents and Plano ISD filed crossmotions for summary judgment. Petitioners' motion acknowledged that it did "not seek summary judgment on the *application*" of the policies, but rather sought only a judgment "declaring the 2004 and 2005 versions of [the policies] facially invalid under the law." R.908 (emphasis in original).

The district court referred the facial challenges to a magistrate judge, who recommended denial of petitioners' summary judgment motion and grant of Plano ISD's crossmotion. R.2816-2843. The magistrate judge recognized that the 2005 policy "was narrowly tailored to achieve the significant governmental interest of 'improving the educational process,' while leaving open ample channels of communication." Pet. App. 4 (footnote omitted); see Pet. App. 24-59; see also R.2835-2836. The district court adopted the magistrate's recommendation in all aspects but one. Pet. App. 17-20. The district court held the 2005 policy constitutional on its face, except for its restriction on elementary-student distribution of materials in the cafeteria during designated meal periods, which the court found unconstitutionally overbroad. Pet. App. 19-20. Adopting the magistrate's recommendation, the district court ruled that the facial validity of the 2004 policy was a moot issue, given the lack of evidence suggesting the district

might, for some reason, revert back to that prior policy. Pet. App. 19; see Pet. App. 4. The district court, therefore, did not address the merits of petitioners' facial challenge to the 2004 policy, petitioners' as-applied challenges, or the issue of the school officials' qualified immunity.

The district court certified as final and appealable its order on the facial constitutionality of the 2004 and 2005 policies. Pet. App. 21. The Fifth Circuit found that the 2005 policy is facially constitutional in all respects, including as it relates to elementary-school-student distribution in cafeterias. The Fifth Circuit reversed the district court's finding that the constitutionality of the 2004 policy is a moot issue and remanded that aspect of the case to the district court for consideration on the merits. That issue is still pending in the district court.

The Fifth Circuit's opinion, authored by Judge Higginbotham, recognized that *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), is about "content or viewpoint based restrictions" of student speech and that "time, place, and manner is the proper standard for evaluating content and viewpoint neutral regulations of student speech." Pet. App. 6 (internal quotation marks omitted). The opinion noted that it is constitutionally permissible to adopt "content and viewpoint neutral" regulations of student speech that are "narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of the information." Pet. App. 7-8 (internal quotation marks and ellipses omitted).

The Fifth Circuit addressed, and dismissed as unconvincing, petitioners' assertion that the law on reasonable time, place, and manner regulations only

applies to regulations addressing expressive conduct and that regulations affecting "pure speech" in the school setting must always be evaluated under the *Tinker* standard. The Fifth Circuit noted that this Court has at least twice upheld reasonable time, place, and manner regulations affecting leafleting or distribution of written materials, on one occasion at a state fair and on another occasion on a public street or sidewalk. Pet. App. 8 (citing *Heffron* v. *Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-648 (1981), and *Hill* v. *Colorado*, 530 U.S. 703, 725-726 (2000)). The court also recognized a serious inconsistency inherent in petitioners' argument, under which time, place, and manner regulations of "pure speech" are permitted in "quintessential public forums" like public streets and sidewalks, while, at the same time, regulations of student distributions at schools "requir[e] the state to clear the higher burden of a substantial disruption" standard. Pet. App. 9 (internal quotation marks omitted).

The court also addressed petitioners' argument, repeated in its petition to this Court, that *Morse* v. *Frederick*, 551 U.S. 393 (2007), and Justice Alito's concurring opinion in that case require application of *Tinker* to all school-speech regulations. Pet. App. 9. *Morse*, the Fifth Circuit noted, did not involve a content- or viewpoint-neutral regulation, and Justice Alito's concurrence, moreover, implicitly recognized that "the generally applicable free speech rules (such as the allowance of time, place, and manner restrictions) continue to apply." Pet. App. 10.

Applying the appropriate standard for time, place, and manner regulations, the Fifth Circuit found that all aspects of the 2005 policy survived constitutional scrutiny. Pet. App. 10-11. The court

recognized that the regulations are content neutral, further a significant legitimate governmental interest the existence of which is supported by more than adequate evidence, and provide ample alternative channels of communication. *Id.*, at 10-12. The court also concluded that the policy is sufficiently narrowly tailored. *Id.*, at 11. As for the aspect of the policy regulating distributions in the cafeteria during elementary-school lunch periods, the court noted "elementary school lunchrooms are heavily controlled yet near chaotic places where school administrators struggle to ensure that young students are able to take lunch in a limited period of time, and that elementary school students are not as mature and require more guidance than older students" during these periods. *Id.*, at 12. Moreover, elementary students have "several opportunities to distribute materials throughout the day," including "after school as well as at recess." *Id.*, at 12-13. Accordingly, the Fifth Circuit reversed the district court's overbreadth finding on the regulations for elementary-school-student distributions in cafeterias.

Finally, the Fifth Circuit addressed the district court's finding that the constitutionality of the 2004 policy was a moot issue, given the evidence that Plano ISD has no intention of reverting to that policy. Pet. App. 13-14. Citing petitioners' claims for nominal damages, the court concluded that the constitutionality of the 2004 policy was not moot and should be considered on the merits in the district court. *Ibid.* The court, therefore, remanded that portion of the case to the district court, which has yet to rule on it. *Id.*, at 14.

REASONS FOR DENYING THE PETITION

Contrary to petitioners' rhetoric, this case does not involve a prohibition of speech. Under Plano ISD's policy, students are allowed to distribute materials containing any constitutionally protected content—including religious content—at various times and places. There is no conflict or confusion among the courts of appeals. No court of appeals has applied *Tinker* to invalidate a policy like Plano ISD's. And every one of the *Tinker* cases petitioners cite involved a prohibition of particular speech, not a time, place, and manner regulation.

The Fifth Circuit upheld Plano ISD's time, place, and manner regulation under long-settled First Amendment jurisprudence. It correctly recognized that neither *Tinker* nor any other precedent of this Court requires public schools to become expressive free-for-alls in which students have a nearly limitless right to interrupt instructional time to express their personal views.

This case just does not present the issue petitioners seek to have the Court opine on. And even if it did, its interlocutory posture would make the Court's review especially inappropriate. Because petitioners' facial challenge was certified for separate appeal, petitioners' as-applied claims have never been adjudicated and will be vigorously contested; but regardless, no record has been developed as to the prohibitions of particular speech alleged in those claims. The Court has long preferred to resolve constitutional challenges in the context of concrete, as-applied claims, and for good reason. The as-applied issues in this case are nowhere near ripe for review.

The Court should deny the petition. The Fifth Circuit's resolution of petitioners' facial challenge breaks no new constitutional ground and creates no conflict in the law. And this partially adjudicated, still pending, case would be an inappropriate vehicle in any event.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS ABOUT EVALUATING TIME, PLACE, AND MANNER REGULATIONS IN SCHOOLS.

A. This Case Does Not Involve a Direct Prohibition on Speech.

Despite conceding at oral argument in the Fifth Circuit and in their petition that Plano ISD's 2005 policy is a content- and viewpoint-neutral regulation of when, where, and how certain student speech may occur, petitioners persist in mischaracterizing the policy as one that prohibits speech. Far from "prohibit[ing] virtually all non-verbal [*sic*] student speech in any school-related context,"[5] Pet. 4, the 2005 policy is all about how certain protected speech—specifically, written noncurricular materials that students desire to distribute—can be accommodated in a school setting.

Quite simply, the policy whose facial validity is at issue in this case does not prohibit *any* speech, except that falling into narrowly defined categories that the Court has already recognized as lacking First Amendment protection in a school setting. Those categories include speech that is obscene, speech promoting illegal drug use, and—invoking the very *Tinker* standard that petitioners urge as the only

---

[5] Petitioners presumably mean all non-oral, rather than all non-verbal, speech.

First Amendment standard applicable in schools—speech that could result in material and substantial disruption. Pet. App. 101-102. Unquestionably, schools can prohibit speech falling into such categories, *e.g.*, *Morse*, 551 U.S., at 408-410; *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 682-683 (1986), and petitioners do not challenge any of those content-specific prohibitions in Plano ISD's policy. Their challenge is only to the policy's regulation of the times, places, and manners in which *permitted* speech may occur.

Like the statute regulating leafleting and displaying signs near a medical facility that was upheld in *Hill* v. *Colorado*, 530 U.S. 703, 720 (2000), Plano ISD's distribution policy "is not a 'regulation of speech.' Rather, it is a regulation of the places where" and times when "some speech may occur." *Id.*, at 719. To the extent petitioners try to give the impression that Plano ISD's policy prohibits religious speech, they are conflating their as-applied claims—which the district vigorously disputes and have not been adjudicated by any court[6]—with the facial challenge that was before the Fifth Circuit. Nowhere on its face does the policy prohibit any speech on the basis that it is religious. See Pet. App. 98-105. Nor can petitioners' insinuations about religious bias be squared with their own concessions that the policy is facially content- and viewpoint-neutral.

Plano ISD's policy balances the synergistic goals of preserving instructional time and protecting free speech rights by providing ample opportunities for

---

[6] Although this case has now been pending for well over five years, no discovery has been conducted relating to any of petitioners' as-applied claims.

students to distribute any materials they desire, as long as they fall outside the narrow categories of unprotected speech. Middle and high school students are free to distribute any (protected) materials they desire almost anywhere and almost anytime before, during, and after school, except in classrooms during the school day. Plano elementary students have almost the same level of freedom, with only two additional restrictions. Because of special considerations in the elementary-school context, elementary students may not distribute materials in the hallways during school hours or in the cafeteria during designated meal periods. But those students can distribute materials at recess, before and after school, and at three annual parties. In addition to the ample opportunities to hand out materials throughout much of the school campus before, during, and after the school day, students at all grade levels may place materials on one or more designated distribution tables at each school, where the materials are available to interested individuals at all times.

The Fifth Circuit had a well-trodden jurisprudential path to follow in upholding those time, place, and manner regulations. "[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron*, 452 U.S., at 647. Rather, activities "protected by the First Amendment[] are subject to reasonable time, place, and manner restrictions." *Ibid.*; see also, *e.g.*, *Cox* v. *Louisiana*, 379 U.S. 536, 554 (1965).

Certain spheres "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly,

communicating thoughts between citizens, and discussing public questions." *Hague* v. *Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (opinion of ROBERTS, J.). Public streets and parks are the archetypal traditional public forums, and in such places the First Amendment guarantee of the freedom of speech is at its zenith. See *id.*, at 515-516.

In those traditional public forums, citizens have broadly protected rights to express themselves—whether by spoken word, expressive conduct, displaying signs, or distributing written materials—but even in such forums the right to express oneself "is not absolute, but relative." *Id.*, at 516; accord, *e.g.*, *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989); *Perry Educ. Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). For example, an individual on a public street within 100 feet of a medical facility may be prohibited from "knowingly approach[ing]" within eight feet of another person without consent "for the purpose of leafletting or displaying signs" or "'engaging in oral protest, education, or counseling.'" *Hill*, 530 U.S., at 720. And persons may be prohibited from sleeping in a public park, even when the sleeping is intended as expressive conduct. *Clark* v. *Cmty. for Creative Non-Violence*, 468 U.S. 288, 298 (1984).

It is "[t]he nature of a place, 'the pattern of its normal activities [that] dictate the kinds of regulations of time, place, and manner that are reasonable.'" *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972). Government can prohibit solicitation on a sidewalk adjacent to a post office, *United States* v. *Kokinda*, 497 U.S. 720, 731 (1990) (plurality opinion), and in airport terminals, *Int'l Soc. for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 684 (1992).

A state fair can confine literature distribution to booths. *Heffron*, 452 U.S., at 654. Leafleting can be regulated on military bases, *Greer* v. *Spock*, 424 U.S. 828, 838 (1976), and in teachers' intraschool mailboxes, *Perry Educ. Assn.*, 460 U.S., at 56.

Tinker does not change those fundamental principles of First Amendment law in their application to a school context. *Tinker* "nowhere suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for his unlimited expressive purposes." *Grayned*, 408 U.S., at 117-118. But petitioners suggest that *Tinker* transforms schools not merely into a public forum but a super-public forum, in which time, place, and manner limitations are facially invalid. Under petitioners' view, while an adult on a public sidewalk near a medical facility may constitutionally be prohibited from knowingly approaching within eight feet of another adult to distribute a leaflet, a child in a classroom must be permitted to thrust the same leaflet at another child absent a showing that such conduct would cause a substantial and material disruption. Petitioners seek a constitutional standard under which students have an unfettered constitutional right to pass love notes or talk out of turn in the classroom, unless those activities cause a disturbance going far beyond interrupting a classroom lesson. See, *e.g.*, R.2790 (petitioners arguing that, under their proposed application of *Tinker*, "[e]ven 'disturbing class' [does] not rise to the level of materiel [*sic*] and substantial disruption where the exercise of such rights in . . . classrooms do [*sic*] not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school").

Petitioners' argument relies on a false dichotomy between what they perceive as the rule established by *Tinker* and a standard laid down in *United States* v. *O'Brien*, 391 U.S. 367 (1968) (upholding a prohibition on destruction of draft cards, even when done with expressive purpose), and similar cases. *Tinker* is not, as petitioners assert, distinguished from cases like *O'Brien* that uphold reasonable restrictions on free expression because *Tinker* deals with "pure speech" while the other cases deal with expressive conduct. *Tinker* itself involved expressive conduct—the silent wearing of plain black armbands. 393 U.S., at 504. As with burning a draft card, sleeping in a public park, or wearing nonuniform school clothes, it was only the expressive content of the wordless conduct that brought First Amendment considerations into play. See *id.*, at 506; cf. *Clark*, 468 U.S., at 298-299 ("No one contends that aside from its impact on speech a rule against camping or overnight sleeping in public parks is beyond the constitutional power of the Government to enforce."). The relevant distinction is not in the form of the expression but in the form and scope of the regulations at issue. *Tinker* involved an absolute ban on wearing armbands, imposed because officials disapproved of the viewpoint the wearers intended to express. It was not the prohibiting of armbands or other apparel items in general, but "the prohibition of expression of one particular opinion . . . without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline" that was "not constitutionally permissible." *Id.*, at 511.

Tinker remains the rule for testing the validity of a viewpoint-based absolute prohibition on particular expression in public schools. And if there is any question whether *Tinker* applies to *prohibitions* of

particular forms of expression that are *not* viewpoint based, this is not the case in which to answer that question. The facial challenge presented by this case involves no prohibition of protected speech. Plano ISD's policy affirmatively permits and provides opportunities for students to distribute their materials at school; it merely prevents them from, say, interrupting math class to do so. The Court has long made very clear that "laws regulating the time, place, or manner of speech stand on a different footing from laws prohibiting speech altogether." *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, 93 (1977).

B. No Circuit Has Applied *Tinker* to Content-Neutral Time, Place, and Manner Regulation of Student Distribution of Materials.

It is easy to understand why petitioners insist on mischaracterizing Plano ISD's policy as a prohibition of particular speech: they cannot even pretend there is a conflict among the circuits without doing so. Petitioners do not cite a single case in which a federal court of appeals applied *Tinker* to evaluate the constitutionality of a school policy governing when, where, or how students can distribute noncurricular materials, or to any policy of the sort. Instead, petitioners cite one case from the Sixth Circuit that upheld a school's distribution policy against an as-applied challenge under the same standard applied by the Fifth Circuit in this case and a few cases that involved prohibitions of specific speech. There is simply no split among the circuits.

Petitioners identify no case from any circuit adopting *Tinker* as the standard for determining the validity of a content-neutral regulation of when,

where, and how some speech may occur in a public school. Every case petitioners cite from the Second, Third, Fourth, and Eighth Circuits—the circuits purportedly on the *Tinker* side of petitioners' imagined split—involved a content-based prohibition of particular speech, not a content-neutral time, place, and manner regulation. *Lowry* v. *Watson Chapel Sch. Dist.*, 540 F.3d 752, 758-759 (CA8 2008) (students prohibited from wearing armbands because armbands signified disagreement with school uniform policy)[7]; *Guiles* v. *Marineau*, 461 F.3d 320, 321 (CA2 2006) (student prohibited from displaying alcohol- and drug-related images on T-shirt); *Newsom* v. *Albemarle County Sch. Board*, 354 F.3d 249, 252-254 (CA4 2003) (student prohibited from displaying images of weapons on T-shirt); *Walker-Serrano* v. *Leonard*, 325 F.3d 412, 414 (CA3 2003) (third grader allegedly prohibited from circulating a petition); *Saxe* v. *State Coll. Area Sch. Dist.*, 240 F.3d 200, 202-204 (CA3 2001) (policy forbidding a broad array of purportedly harassing speech that "prohibit[ed] a substantial amount of speech that would not constitute actionable harassment under either federal or state law"). And of those, only *Saxe* presented a pure facial challenge.

Petitioners' purported "hybrid approach," Pet. 20, case from the Seventh Circuit—*Nuxoll* v. *Indian Prairie School District No. 204*, 523 F.3d 668 (CA7 2008)—also involved a content- and viewpoint-based prohibition of particular speech. A student had been prohibited from making negative comments about

---

[7] *Lowry* also involved a student's being disciplined for distributing a flyer without prior approval, 540 F.3d, at 756, but the Eighth Circuit's First Amendment analysis addressed only the ban on armbands, *id.*, at 759-761.

homosexuality. *Id.*, at 669. Whether or not *Nuxoll*'s approach was a "hybrid," it is irrelevant because *Nuxoll* did not involve the same question the Fifth Circuit addressed in this case. Nor did *Walker-Serrano* apply *Tinker* to a school's distribution policy, despite petitioners' parenthetical suggesting just that. See Pet. 17. *Walker-Serrano* considered the alleged suppression of a particular petition, not the constitutionality of the school's distribution policy. 325 F.3d, at 418.

The only case identified by petitioners, other than this one, that actually involved the constitutionality of a content-neutral policy regulating when, where, and how students could distribute noncurricular materials is *M.A.L.* v. *Kinsland*, 543 F.3d 841 (CA6 2008). And *M.A.L.*, as petitioners correctly note, took an approach identical to that taken by the Fifth Circuit in this case, upholding—against an as-applied challenge—a distribution policy that was more restrictive than Plano ISD's. *Id.*, at 850-851. There can be no split when the only other circuit considering similar issues has applied the same approach and reached the same conclusion as the Fifth Circuit in this case.

Of the other cases that petitioners identify as being on the Fifth Circuit's side (*i.e.*, the only side) of their imagined split, *Porter* v. *Ascension Parish Sch. Board*, 393 F.3d 608 (CA5 2004), involved "unique facts," *id.*, at 621, and an analysis inapposite to any issue presented in this case. The Fifth Circuit, invoking both *Tinker* and its own holding in *Canady* v. *Bossier Parish School Board*, 240 F.3d 437 (CA5 2001), found that a student could not be disciplined over a violent drawing that, it was undisputed, he had never intended to communicate to anyone on school grounds. *Porter*, 393 F.3d, at 615, 621.

Petitioners' remaining cases involved school dress code or uniform policies, not materials-distribution policies. *Palmer* v. *Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 506 (CA5 2009), *cert. denied*, 130 S.Ct. 1055 (2010); *Jacobs* v. *Clark County Sch. Dist.*, 526 F.3d 419, 422 (CA9 2008); *Blau* v. *Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 385 (CA6 2005); *Canady*, 240 F.3d, at 438. Like this case and *M.A.L.*, the dress code cases are distinguishable from petitioners' cases applying *Tinker* because they involved content-neutral policies that did not seek to prohibit particular speech because of the content it contained or the viewpoint it expressed. Compare *Palmer*, 579 F.3d, at 510; *Jacobs*, 526 F.3d, at 434; *Blau*, 401 F.3d, at 391; *Canady*, 240 F.3d, at 442, with, *e.g.*, *Guiles*, 461 F.3d, at 321 (alcohol- and drug-related images specifically prohibited); *Newsom*, 354 F.3d, at 252-254 (same for images of weapons). Thus every circuit that has considered a generalized school apparel policy—as opposed to a targeted ban of specific expressive adornments, messages, or images—has treated it as imposing "time, place, manner restrictions" subject to intermediate scrutiny under a consistently applied standard. *Palmer*, 579 F.3d, at 508 & nn.3, 7.[8]

The Court has already this Term denied review of a school dress code case brought by counsel for petitioners in this case. *Palmer*, 130 S.Ct., at 1055. To the extent a content-neutral school apparel policy is analogous to the time, place, and manner

---

[8] In an unreported, *per curiam* opinion, the Eleventh Circuit applied the same standard to uphold a school board's limitation on students' wearing pierced jewelry. *Bar-Navon* v. *Brevard County Sch. Board*, 290 Fed. Appx. 273, 276-277 (CA11 2008) (*per curiam*) (unpublished).

limitations imposed on student distribution of noncurricular written materials under Plano ISD's policy, all the cases line up on the same side. To the extent dress codes or uniform requirements present different questions—for example, whether even a content-neutral prohibition of printed messages on T-shirts warrants a higher level of scrutiny than intermediate—this case could not be the case in which to address them. Plano ISD's policy permits all constitutionally protected written materials to be distributed on its school campuses, at appropriate times and places.

II. THIS CASE IS A POOR VEHICLE FOR ADDRESSING THE QUESTION PRESENTED.

Because there is no conflict among the courts of appeals and because the Fifth Circuit's ruling is both correct and consistent with this Court's prior decisions, review of this case is unwarranted, just as it was unwarranted in *Palmer*, in which counsel for petitioners attempted to present substantially the same question regarding the application of *Tinker*. See Pet. for Writ of Cert. at i, *Palmer* v. *Waxahachie Indep. Sch. Dist.*, No. 09-409 (2009). But review is also unwarranted because this case is a poor vehicle for reviewing the question presented, particularly at this interlocutory stage of the case in which only the facial challenge to the 2005 policy has been addressed. Respondents' as-applied challenges and claims lodged against the remaining individual defendants are still outstanding and unresolved.[9] As

---

[9] In addition to Plano ISD, individual defendants Lynn Swanson, Lisa Long, Suzie Snyder, and Jackie Bomchill remain as parties to the underlying suit, with unresolved claims against them.

the Fifth Circuit noted in its opinion, "regardless of [the court's] disposition of this matter, [petitioners] will continue to litigate the constitutionality of the District's rules." Pet. App. 4, n.5.

This case is particularly unsuitable for review because of its interlocutory posture. Petitioners raised both facial and as-applied challenges. The Fifth Circuit, however, has addressed only the facial challenge to the 2005 policy. Pet. App. 13-14. The facial challenge to the 2004 policy and the as-applied challenges remain pending before the district court. *Ibid.* Additionally, a separate appeal regarding qualified immunity remains pending before the Fifth Circuit. See *Morgan* v. *Swanson*, No. 09-40373 (CA5, oral argument heard Apr. 7, 2010). In other words, the case in its current posture presents the court with only one of a number of live issues, while challenges to the facial constitutionality of the 2004 policy, as-applied challenges, issues of qualified immunity, and various claims asserted against individual defendants all remain unresolved.

The interlocutory nature of the court of appeals's judgment "alone furnishe[s] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see also *Bhd. of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (*per curiam*) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied."); *American Constr. Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372, 384 (1893) (stating that the Court generally will not review interlocutory orders absent "extraordinary" circumstances); *Virginia Military*

Inst. v. *United States*, 508 U.S. 946, 946 (1993) (opinion of SCALIA, J., respecting denial of petition for writ of certiorari) (stating that the Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction").

Even the Fifth Circuit acknowledged the procedural posture of this case as "perverse in execution." Pet. App. 4, n.5. The Fifth Circuit explained, in addressing the district court's certification under Federal Rule of Civil Procedure 54(b) of its judgment on the claims of facial unconstitutionality, that "we remain *dubitante* over the efficiency of separating the claims into separate appeals, an effort further complicated by the later denial of qualified immunity to individual defendants." Pet. App. 4, n.5 (emphasis added). Petitioners cannot seriously suggest that granting review at this time will conserve resources in litigating the claims that remain pending in the district court and the Fifth Circuit.[10]

More fundamentally, that the Court's review at this stage might serve petitioners' convenience does not make the case a proper vehicle for resolving the constitutional question. While petitioners stridently (and incorrectly) suggest that the Fifth Circuit's decision "will affect the First Amendment rights of millions of students," Pet. 31, this fact, if true, would only further justify denial of the petition because the relevant factual record is incomplete and because it is

---

[10] Petitioners' suggestion that the district court "recognized the importance" of the issue when it certified the judgment under rule 54(b) is unsupported by the record. Pet. 2. The district court's certification order never even suggests that its decision was based on the importance of the issue presented. R.3764-3766.

this Court's well-established practice to avoid deciding facial challenges while as-applied challenges remain pending.

The incomplete factual record alone justifies denial of the petition. Petitioners' question presented characterizes the 2005 policy as viewpoint neutral. Pet. i. But petitioners repeatedly suggest in their petition that respondent has, in fact, applied the policy in a viewpoint-based manner. See, *e.g.*, Pet. 4, 33; see also R.1530-1670. And petitioners also suggest that the standard of review applied to viewpoint-neutral policies should be based, in part, on the danger that they will be applied in viewpoint-based ways. See, *e.g.*, Pet. 14, 32. Indeed, although it is only the facial challenge that was before the Fifth Circuit and that petitioners seek to place before this Court, petitioners cannot refrain from discussing their (meritless, not-yet-adjudicated) as-applied claims at every turn. The record on appeal, however, is not yet developed regarding how the policies were applied because the as-applied claims remain pending before the district court and have not been heard by the Fifth Circuit. If the issue presented in this case is as important as petitioners incorrectly suggest, the Court should not address these constitutional issues on an incomplete record regarding factual issues that may be relevant to the constitutional analysis.

Finally, the Court should not grant review of the claim facially challenging the constitutionality of the 2005 policy while the as-applied challenge remains pending in the district court. *Renne* v. *Geary*, 501 U.S. 312, 323-324 (1991) (facial challenge should generally not be entertained when an "as-applied" challenge could resolve the case); *United States* v. *Raines*, 362 U.S. 17, 20-22 (1960) (describing the

Court's preference for as-applied rather than facial challenges). As the Court recently explained, "[f]acial challenges are disfavored for several reasons" including because they "run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 450 (2008) (internal quotation marks omitted); see also *Gonzales* v. *Carhart*, 550 U.S. 124, 168 (2007) (noting that "[a]s-applied challenges are the basic building blocks of constitutional adjudication").

CONCLUSION

For these reasons, the Court should deny the petition.

Respectfully submitted,

RICHARD M. ABERNATHY
CHARLES J. CRAWFORD
ABERNATHY, ROEDER,
BOYD & JOPLIN, P.C.
1700 Redbud Blvd.
Suite 300
McKinney, Texas 75069
(214) 544-4000

GREGORY S. COLEMAN
Counsel of Record
CHRISTIAN J. WARD
RICHARD B. FARRER
YETTER, WARDEN &
COLEMAN, L.L.P.
221 West Sixth Street
Suite 750
Austin, Texas 78701
(512) 533-0150
gcoleman@ywcllp.com

Counsel for Respondent
Plano Independent
School District

Supreme Court, U.S.
FILED
JUN 14 2010
OFFICE OF THE CLERK

No. 09-1131

In the
Supreme Court of the United States

DOUG MORGAN; ROBIN MORGAN; JIM SHELL; SUNNY SHELL; SHERRIE VERSHER; AND CHRISTINE WADE,

PETITIONERS,

v.

PLANO INDEPENDENT SCHOOL DISTRICT, ET AL.,

RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

KELLY SHACKELFORD
HIRAM S. SASSER, III
JEFFREY C. MATEER
LIBERTY LEGAL INSTITUTE
2001 Plano Parkway
Suite 1600
Plano, TX 75075
(972) 941-4444

PAUL D. CLEMENT
Counsel of Record
ASHLEY C. PARRISH
CANDICE CHIU
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
pclement@kslaw.com
(202) 737-0500

Counsel for Petitioners

*additional counsel listed on inside cover

June 11, 2010

Additional Counsel for Petitioners:

CLYDE MOODY SIEBMAN
SIEBMAN REYNOLDS
BURG & PHILLIPS LLP
300 N. Travis St.
Sherman, TX 75090
(903) 870-0070

WM. CHARLES BUNDREN
WM. CHARLES
BUNDREN & ASSOCIATES
2591 Dallas Parkway
Suite 300
Frisco, TX 75034
(972) 624-5338

TABLE OF CONTENTS

REPLY BRIEF FOR PETITIONERS 1

I. The Decision Below Conflicts With Decisions From Other Courts Of Appeals 2

II. The Decision Below Conflicts With This Court's Precedents. 6

III. This Case Presents An Ideal Vehicle For Resolving An Important, Recurring Constitutional Issue 10

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Bair v. Shippensburg Univ.,
280 F. Supp. 2d 357 (M.D. Pa. 2003) 5

Bar-Navon v. School Bd. of Brevard County,
No. 6:06-cv-1434,
2007 WL 3284322 (M.D. Fla. Nov. 5, 2007) 3, 4

Bethel Sch. Dist. No. 403 v. Fraser,
478 U.S. 675 (1986) 7

C.H. v. Bridgeton Bd. of Educ.,
No. 09-5815,
2010 WL 1644612 (D.N.J. Apr. 22, 2010) 3

Canady v. Bossier Parish Sch. Bd.,
240 F.3d 437 (5th Cir. 2001) 2, 3

DeJohn v. Temple Univ.,
537 F.3d 301 (3d Cir. 2008) 5

Guiles v. Marineau,
461 F.3d 320 (2d Cir. 2006) 2, 3

Hazelwood Sct. Dist. v. Kuhlmeier,
484 U.S. 260 (1988) 7

Jacobs v. Clark County Sch. Dist.,
526 F.3d 419 (9th Cir. 2008) 7

McCauley v. University of V.I.,
No. 2005-188,
2009 WL 2634368 (D.V.I. Aug. 21, 2009) 5

Morse v. Frederick,
551 U.S. 393 (2007) 7

National Endowment for the Arts v. Finley,
524 U.S. 569 (1998) 12

Renne v. Geary,
501 U.S. 312 (1991) 12

Saxe v. State Coll. Areas Sch. Dist.,
240 F.3d 200 (3d Cir. 2003) 3

Spence v. Washington,
418 U.S. 405 (1974) 6

Texas v. Johnson,
491 U.S. 397 (1989) 6

Tinker v. Des Moines Indep. Cmty. Sch. Dist.,
393 U.S. 503 (1969) ..... passim

United States v. O'Brien,
391 U.S. 367 (1968) ..... passim

United States v. Stevens,
130 S. Ct. 1577 (2010) 2, 12

Washington State Grange v. Washington State Republican Party,
552 U.S. 442 (2008) 12

West Virginia State Bd. of Educ. v. Barnette,
319 U.S. 624 (1943) 13

Other Authorities

Frank D. LoMonte,
Shrinking Tinker: Students are "Persons" Under Our Constitution—Except When They Aren't,
58 AM. U. L. REV. 1323 (2009) 4

R. George Wright,
Doubtful Threats and the Limits of Student Speech Rights,
42 U.C. DAVIS L. REV. 679 (2009) 3

ROBERT L. STERN, ET AL.,
SUPREME COURT PRACTICE (9th ed. 2007) 11

REPLY BRIEF FOR PETITIONERS

The petition asks the Court to review a straightforward question of law: Is the constitutionality of a student speech policy governed by *Tinker*'s "substantial disruption" standard or *O'Brien*'s intermediate scrutiny standard? As explained in the petition, there is a well-recognized split among the lower courts of appeals; the Fifth Circuit's decision applying *O'Brien* to restrictions on "pure speech" is at odds with this Court's precedents; and this case presents a clean vehicle for resolving the important legal question presented.

The collective focus of Respondents' two oppositions is less on denying the split in authority and more on arguing the merits of their side of the split and complaining that allegations of misconduct are only allegations at this stage of the case. Petitioners firmly disagree with Respondents' view that *Tinker* is limited to cases involving viewpoint- or content-based discrimination. But, more importantly, a number of circuits disagree with Respondents and the Fifth Circuit. A final resolution of the merits arguments that Respondents are eager to reach can await plenary review after this Court grants certiorari to resolve the circuit split.

Moreover, contrary to Respondents' assertions, the fact that this case is in the posture of a facial challenge is no reason to deny the petition. This Court has never hesitated to resolve facial challenges to overreaching restrictions on speech where (as here) the case "does not rest on factual

assumptions." *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010). The school district's sweeping restrictions on speech open a huge potential for abuse, including some of the misconduct noted in the petition. It is the potential for such abuse that raises concerns under the First Amendment, and it is why the facial nature of the challenge provides no reason for this Court to deny review.

I. The Decision Below Conflicts With Decisions From Other Courts Of Appeals.

Respondents assert, echoing the decision below, that *Tinker* establishes a limited rule that applies only when "testing the validity of a viewpoint-based absolute prohibition on particular expression in public schools." Plano Opp'n 19. Petitioners respectfully disagree for reasons explained in the petition. *See* Pet. 24–30. But, more importantly, a number of courts of appeals have expressly disagreed as well, which creates the circuit split the Fifth Circuit previously acknowledged. *See Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 443 (5th Cir. 2001). In particular, other circuits have rebuffed the notion that *Tinker* is relevant only to viewpoint-based discrimination, holding that (with limited exceptions) *Tinker* "applies to *all* non-school-sponsored student speech." *Guiles v. Marineau*, 461 F.3d 320, 326 (2d Cir. 2006) (emphasis added). In these circuits, *Tinker* is not the limited standard that Respondents posit; instead, it is a "*general rule*" that applies except with respect to three narrow categories of speech that this Court has carved out from *Tinker*'s ambit. *Saxe v. State Coll.*

Areas Sch. Dist., 240 F.3d 200, 214 (3d Cir. 2003) (emphasis added); *Guiles*, 461 F.3d at 326.

Respondents contend that the conflict identified in the petition is an "imagined split," Plano Opp'n 22, and that "there is no ... confusion among the courts of appeals." *Id.* at 13; *see also id.* at 3, 20. But these assertions cannot be squared with the Fifth Circuit's own acknowledgement of a split and a legion of court decisions and law review articles recognizing that whether *Tinker* applies to content- and viewpoint-neutral restrictions on speech "is unclear" because "the circuit courts are currently divided." R. George Wright, *Doubtful Threats and the Limits of Student Speech Rights*, 42 U.C. DAVIS L. REV. 679, 712–13 (2009). When the Fifth Circuit first advanced the view that *Tinker* applies only to content- and viewpoint-neutral restrictions, it acknowledged that it was breaking ranks with "several circuits" that had applied *Tinker* to cases beyond the "viewpoint-specific category." *Canady*, 240 F.3d at 443. More recently, the Second Circuit lamented the "lack of clarity" in this Court's student-speech cases over whether *Tinker* establishes a general rule or applies only to viewpoint-based discrimination. *Guiles*, 461 F.3d at 326.

The split in authority has also been recognized by numerous district courts. *See, e.g., C.H. v. Bridgeton Bd. of Educ.*, No. 09-5815, 2010 WL 1644612, at **5–6 (D.N.J. Apr. 22, 2010) (discussing split); *Bar-Navon v. School Bd. of Brevard County*, No. 6:06-cv-1434, 2007 WL 3284322, at *6 (M.D. Fla. Nov. 5, 2007) (courts "are split" as to whether *Tinker* is a "basic standard").

And it has been grist for law review articles. *See* Pet. 21. As commentators have explained, most courts have concluded that *Tinker* supplies "the default standard" in student speech cases, but "at least three" courts of appeals have adopted Respondents' minority position, limiting *Tinker* to the "relatively rare instance when a regulation discriminates based on the speaker's viewpoint." Frank D. LoMonte, *Shrinking Tinker: Students are "Persons" Under Our Constitution—Except When They Aren't*, 58 AM. U. L. REV. 1323, 1328 (2009). In short, it is widely recognized that courts "at all levels have demonstrated confusion as to the scope of *Tinker's* holding." *Bar-Navon*, 2007 WL 3284322, at *5.

Respondents attempt to paper over this confusion, arguing that "no Circuit has applied *Tinker* to content-neutral time, place, and manner regulation of student distribution of materials." Plano Opp'n 20 (subheading). In their view, the split in precedent dissolves if legal rulings are overlooked and the cases parsed on their facts. Respondents contend that the many court decisions pronouncing *Tinker* a "general rule" are irrelevant because the decisions (arguably) did not address content-neutral time, place, and manner restrictions on speech.

This attempt to fly-spec factual scenarios addressed in lower court decisions only confirms the weakness of Respondents' position. Respondents' factual parsings are distortions that are ultimately beside the point, for the courts that apply *Tinker* as a general default rule have no cause to focus on whether student-speech

restrictions are content-based or not. Respondents ignore the straightforward *legal issue* set out in the question presented: should the constitutionality of a student speech policy be evaluated under *Tinker*'s "substantial disruption" standard or *O'Brien*'s "intermediate scrutiny" standard? That question can be resolved without focusing on the facts of the particular policy. In any event, to the extent other courts have not confronted such sweeping bans on student speech, that is a testament to the breadth of Respondents' policy and the narrowness of their conception of student speech rights, not a reason to deny certiorari. *See* Swanson Opp'n 11–12 (pressing position that elementary school students have no speech rights).

In any event, it is clear that, in direct conflict with the decision below, courts in other circuits have applied *Tinker* when evaluating all manner of student speech policies. *See, e.g.*, *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (applying *Tinker* to sexual harassment policy prohibiting "gender-motivated" speech); *McCauley v. University of V.I.*, No. 2005-188, 2009 WL 2634368, at *14 (D.V.I. Aug. 21, 2009) (applying *Tinker* in facial challenge to "hazing-harassment" provisions of student code restricting speech); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (applying *Tinker* in facial challenge to university speech policy). This Court can and should grant review to resolve this conflict and to bring clarity to this unsettled area of law.

II. The Decision Below Conflicts With This Court's Precedents.

Respondents offer no direct response to the fact that the Fifth Circuit's decision contravenes fundamental principles in this Court's First Amendment student speech jurisprudence. Pet. 22–30. They do not defend the Fifth Circuit's novel conclusion that *O'Brien* applies to restrictions on "pure speech." App. 8–9 (that "'pure speech' is being regulated here is of no moment"). For reasons explained in the petition, that conclusion conflicts with this Court's precedents limiting "*O'Brien*'s relatively lenient standard to those cases" in which the "governmental interest" is "unconnected to expression" and "unrelated to the suppression of free expression." *Texas v. Johnson*, 491 U.S. 397, 401 (1989); *see* Pet. 23–24. Whatever the proper test for content-neutral restrictions on free speech, there is no reason—certainly Respondents offer none—that *O'Brien* would be the test. To that end, Respondents' complaint that petitioners seek greater free speech rights for students than adults gets things backwards. No one could seriously argue that *O'Brien* applies to restrictions on "pure speech" by adults. *Spence v. Washington*, 418 U.S. 405, 411, 414 n.8 (1974).

Respondents seek to distance themselves from the Fifth Circuit's misguided rationale, suggesting that the distinction between "pure speech" and "expressive conduct" is unhelpful and that the "relevant distinction is not in the form of the expression but in the form and scope of the regulations." Plano Opp'n 19. But *O'Brien* is all about providing less protection to conduct that is

not "pure speech." Moreover, Respondents' suggestion is "diametrically opposed to the teachings" of this Court's decisions in *Tinker*, *Hazelwood*, *Fraser*, and *Morse*, which have "consistently focused on the nature of the speech itself." *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 442–43 (9th Cir. 2008) (Thomas, J., dissenting). Contrary to Respondents' assertions, it "is the character of the speech, not the content of the government regulation that forms the framework of the First Amendment analysis in student speech cases." *Id.* at 443.

The point is confirmed by *Tinker* itself. Although, as Respondents note, *Tinker* involved expressive conduct (wearing armbands), the Court took pains to emphasize that the conduct was "closely akin to 'pure speech' ... entitled to comprehensive protection under the First Amendment." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969). Accordingly, even though the school's no-armbands policy was facially viewpoint- and content-neutral, *Tinker* held that the school could not prohibit students from wearing armbands. Pet. 24–25. Tellingly, although Respondents argue that the form of regulation is the touchstone for First Amendment analysis, their own efforts to distinguish lower court decisions fixate on the form of speech. *See* Plano Opp'n 21–23 (characterizing cases as addressing students' rights to wear T-shirts, distribute non-curricular materials, and draw violent pictures).

Respondents further contend that Petitioners' arguments rely "on a false dichotomy between"

Tinker and *O'Brien*. In fact, the shoe is on the other foot. Contrary to Respondents' extravagant claims, Petitioners have never argued that *Tinker* "transforms schools" into a "super-public forum, in which time, place, and manner limitations are facially invalid." Plano Opp'n 18. Nor do Petitioners seek a "constitutional standard under which students have an unfettered constitutional right to pass love notes or talk out of turn." *Id.* To the contrary, as *Tinker* recognized, school officials have broad authority to restrict student speech "for any reason—whether it stems from *time*, *place*, or *type* of behavior"—if it "materially disrupts class work or involves substantial disorder or invasion of the rights of others." *Tinker*, 393 U.S. at 513 (emphasis added). *Tinker* is a test that is tailored to the "time" and "place" of the school setting. Pet. 2. Taking account of the "special characteristics of the school environment," that test furthers the interests of school officials in maintaining discipline, while scrupulously protecting student liberties. *Tinker*, 393 U.S. at 506. Lowering the standard for content-neutral time, place, and manner restrictions, as Respondents suggest, amounts to impermissible double-counting that dilutes essential First Amendment protections.

Throughout their opposition, Respondents take the startling position that because it is content-neutral the school district's speech policy somehow "does not involve a prohibition on speech." Plano Opp'n 13 (the "policy ... does not prohibit *any* speech") (emphasis added). Respondents even go so far as to suggest that the policy is "all about how certain protected speech ... *can be accommodated* in

a school setting." *Id.* at 14 (emphasis added). But "content-neutrality" is not a First Amendment virtue when all content is suppressed, and wringing all speech out of the school system is an odd "accommodating" of protected speech. The policy broadly prohibits student "[d]istribution" of "materials" in "classrooms" during "school hours," App. 99, 103, with breathtakingly expansive definitions of each term: "Distribution" means the "circulation of any ... writing, items, objects, articles or other materials." App. 98. "Classrooms" mean any location for providing or facilitating "student instruction," "school-sponsored extracurricular activities," or "programming for students," including "gymnasiums, auditoriums, cafeterias, hallways, and outdoor facilities." *Id.* And "school hours" encompass both instructional hours and any hours when students are participating in extracurricular activities. *Id.* In effect, the *Student Expression* policy bans the distribution of any form of written material in any school building at nearly any time that school doors are open to students.

To be sure, as the petition recognizes, there are limited exemptions from the policy's anti-speech provisions. Students may, for example, distribute materials for 30 minutes before and after "school hours" at the school's entrance or exit, or at designated "gathering area[s]." *Id.* at 99, 103. Elementary school students may distribute materials three times a year at school-sanctioned parties. *Id.* at 101. And secondary school students may distribute materials in "hallways during non-

instructional times" and during "designated lunch periods." *Id.* at 103.

But those narrow exceptions only highlight the sweeping nature of the speech restrictions. In arguing that schools may ban all forms of written speech, as long as they leave open certain narrow exceptions, Respondents turn the First Amendment on its head. As *Tinker* recognized, "in our system, state-operated schools may not be enclaves of totalitarianism." *Tinker*, 393 U.S. at 511. And the central principle of *Tinker* cannot be eviscerated by wringing speech rights from the school day.

III. This Case Presents An Ideal Vehicle For Resolving An Important, Recurring Issue.

For reasons set out in the petition, the Court should grant certiorari because the dispute over the standard of review is cleanly presented in this case. *See* Pet. 30–33. Respondents disagree, contending that review should be denied because the case is in an "interlocutory posture," the factual record is incomplete, and facial challenges are purportedly disfavored. None of these assertions withstand scrutiny.

In this case, Respondents' supposed vices are in fact virtues. The district court granted interlocutory review to allow appellate courts to resolve "the distinct legal question regarding the facial constitutionality of the school district policies." App. 22. Whatever questions the Fifth Circuit may have raised about teeing up that purely legal question as a matter of efficiency, the Fifth Circuit "defer[red] to the judgment of the

district court" and decided the legal issue, ruling definitively that *Tinker* does not apply to viewpoint-neutral student speech codes. The issue of what standard applies is thus ripe for this Court's decision. The interlocutory nature of this case only means that the Fifth Circuit's erroneous standard—and not *Tinker*—will govern further proceedings. *See* ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE 281 (9th ed. 2007) (when "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case ... the case may be reviewed despite its interlocutory nature") (citing cases). And the issue is a dispositive one. The school district's speech policy imposes such sweeping restrictions on speech that it could not be upheld unless *O'Brien* applies; in fact, in the proceedings below, Respondents did not even attempt to argue that their policy satisfied *Tinker*. Moreover, because the district court served up a clean legal issue, this Court would have the option of either addressing only that pure issue of law or going forward and applying the correct standard to Respondents' blunderbuss policy.

Respondents also complain that the petition recites certain facts (which they dispute) about how the policy has been applied to discriminate against religious views. *See* Pet. 5–8. But the facts were included to describe the history of the case and to illustrate the grave risks that overbroad, sweeping restrictions on speech pose to students' First Amendment rights—and the temptation for school districts criticized for imposing discriminatory restrictions on speech to opt to eliminate all speech. *See National Endowment for the Arts v. Finley*, 524

U.S. 569, 620 (1998) (the Court has not hesitated to consider "the merits" of facial challenges "to policies that ... vested officials with open-ended discretion that threatened" viewpoint discrimination) (quotation omitted). It is the potential for that abuse—not an actual adjudication—that informs a facial challenge.

Unlike the cases cited by Respondents, which involve "factual assumptions" that could "be evaluated only in the context of an as-applied challenge," *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 444 (2008), the facial challenge in this case "does not rest on factual assumptions." *Stevens*, 130 S. Ct. at 1587. Nor is there any risk that the facial challenge will become moot. *See Renne v. Geary*, 501 U.S. 312, 323–24 (1991). Moreover, determining the standard of review applicable to a school district's policy restricting student speech will not disable government from addressing speech in a more targeted fashion or from targeting the particular types of disruptive speech addressed in this Court's *Tinker* line of cases.

Finally, Respondents admit that there is a "lack of clarity in this Court's jurisprudence regarding the application of the First Amendment in elementary schools," and argue that this issue presents a "worthy question ... to review," albeit not the one presented by Petitioners. Swanson Opp'n 11–12. They reiterate their position below that elementary school students have no free speech rights. This extreme position appears meritless. *See West Virginia State Bd. of Educ. v.*

Barnette, 319 U.S. 624 (1943). But if there is anything to the contention that there is a lack of clarity on this question, it only underscores the need for certiorari. The question Respondents say is cert-worthy would be addressed and clarified if this Court granted review. Respondents' policy applies in elementary schools and in higher grades, and this Court can certainly consider Respondents' remarkable suggestion that the First Amendment rights that are not surrendered at the schoolhouse gates do not attach until junior high school.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
ASHLEY C. PARRISH
CANDICE CHIU
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
pclement@kslaw.com
(202) 737-0500

KELLY SHACKELFORD
HIRAM S. SASSER, III
JEFFREY C. MATEER
LIBERTY LEGAL INSTITUTE
2001 Plano Parkway, Ste. 1600
Plano, TX 75075
(972) 941-4444

Clyde Moody Siebman
SIEBMAN REYNOLDS BURG
& PHILLIPS LLP
300 N. Travis St.
Sherman, TX 75090
(903) 870-0070

WM. CHARLES BUNDREN
WM. CHARLES BUNDREN &
ASSOCIATES
2591 Dallas Parkway, Ste. 300
Frisco, TX 75034
(972) 624-5338

June 11, 2010 *Counsel for Petitioners*

FILED
APR 19 2010
CLERK

No. 09-1131

IN THE
Supreme Court of the United States

DOUG MORGAN, ROBIN MORGAN, JIM SHELL, SUNNY SHELL, SHERRIE VERSHER, AND CHRISTINE WADE,

Petitioners,

v.

PLANO INDEPENDENT SCHOOL DISTRICT, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

JAY ALAN SEKULOW
Counsel of Record
WALTER M. WEBER
CARLY F. GAMMILL
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Avenue, N.E.
Washington, DC 20002
(202) 546-8890
sekulow@aclj.org
Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

THIS COURT SHOULD GRANT THE PETITION BECAUSE THE DECISION OF THE FIFTH CIRCUIT CONFLICTS WITH DECISIONS OF THIS COURT 3

A. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT THAT CONSISTENTLY HAVE RECOGNIZED THE *TINKER* STANDARD AS THE GENERAL RULE APPLICABLE TO RESTRICTIONS OF PURE SPEECH IN THE PUBLIC SCHOOL SETTING 4

B. THE DECISION BELOW MARKS A DEPARTURE FROM THIS COURT'S DECISIONS WHICH CLARIFY THAT THE PURPOSE OF THE *O'BRIEN* TEST IS TO ANALYZE RESTRICTIONS IMPOSED ON EXPRESSIVE CONDUCT, NOT PURE SPEECH 9

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Adderley v. Florida, 385 U.S. 39 (1966) 11

Bethel Sch. Dist. v. Fraser,
478 U.S. 675 (1986) 6-8

Cox v. Louisiana, 379 U.S. 536 (1965) 11

Hazelwood Sch. Dist. v. Kuhlmeier,
484 U.S. 260 (1988) 6-8

Keyishian v. Board of Regents,
385 U.S. 589 (1967) 6

Lorillard Tobacco Co. v. Reilly,
533 U.S. 525 (2001) 11

McConnell v. FEC, 540 U.S. 93 (2003) 10-11

Morse v. Frederick, 127 S. Ct. 2618 (2007) 7, 8

Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006) 10

Texas v. Johnson, 491 U.S. 397 (1989) 6, 11

Tinker v. Des Moines Indep. Sch. Dist.,
393 U.S. 503 (1969) ..... *passim*

United States v. O'Brien,
391 U.S. 367 (1968) ..... *passim*

INTEREST OF AMICUS[1]

Amicus, the American Center for Law and Justice (ACLJ), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have appeared frequently before the Court as counsel for parties or for amici in cases involving constitutional issues, with a particular emphasis on the First Amendment. In particular, Counsel of Record for amicus has argued twelve times before this Court, most recently in *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009).[2] Proper resolution of this case is of significant interest to the ACLJ as it presents a recurring issue regarding the degree of protection properly afforded to public school students in the exercise of their First Amendment right to freedom of speech.

The ACLJ is committed to protect the free speech rights of individuals, including public school students. While public school officials undoubtedly maintain the authority to act in furtherance of the

---

[1] Counsel of record for the parties received timely notice of the intent to file this brief pursuant to S. Ct. R. 37.2(a). The parties have consented to the filing of this brief. Copies of the parties' written consent are being filed herewith. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

[2] *See also McConnell v. FEC*, 540 U.S. 93 (2003); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987).

discipline and protection of students during the school day, it is vitally important that school boards, as arms of the government, not be allowed to silence our nation's youth by enacting policies that discriminatorily or unnecessarily restrict student speech on school campuses. Policies and practices that suppress private student messages merely because they have not received approval from school officials strike at the core of the First Amendment. Likewise, policies that broadly prohibit non-disruptive student expression fail adequately to protect students' free speech rights. It is essential that lower courts understand and apply the proper constitutional standard when assessing the government's attempts to limit the free speech rights of public school students. Because the decision below sharply departs from the settled precedent of this Court, and thus seriously unsettles the clarity of the law, this Court should grant review.

SUMMARY OF ARGUMENT

This Court enunciated the rule for analyzing the constitutionality of restrictions on the free speech rights of public school students in *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969). In the forty years since this decision, this Court has continued to recognize *Tinker* as the governing standard in student speech cases. In particular, not once during that time has the Court applied the different—and lower—standard for restrictions on expressive *conduct* announced in *United States v. O'Brien*, 391 U.S. 367 (1968), to government regulations of pure speech in the public

school setting. The application of the *O'Brien* test by the Fifth Circuit marks another clear departure by that circuit from this Court's decisions. This Court should grant the petition for certiorari to correct the Fifth Circuit's continued erroneous invocation of the *O'Brien* test to analyze a restriction on pure student speech that is properly governed instead by the standard enunciated in *Tinker*.

ARGUMENT

The issue in this case is what constitutional standard governs a public school's restriction of non-disruptive student distribution of lawful written speech. This Court has consistently applied the *Tinker* standard to this type of student speech, but the Fifth Circuit instead chose to apply the *O'Brien* test, which governs expressive conduct (like burning draft cards), not pure speech (like leafleting). This Court should grant review.

THIS COURT SHOULD GRANT THE PETITION BECAUSE THE DECISION OF THE FIFTH CIRCUIT CONFLICTS WITH DECISIONS OF THIS COURT.

Amicus wishes to highlight the Fifth Circuit's blatant departure from this Court's relevant decisions as an important reason for the Court to grant the petition for certiorari. It appears certain that until this Court addresses the question presented herein, public school students within the jurisdiction of the Fifth Circuit will continue to

receive inadequate protection of their First Amendment speech rights.

This Court has held that restrictions on student speech are governed by the *Tinker* standard—which provides that a public school may not silence pure student speech that does not materially and substantially disrupt the proper discipline and functioning of the school—not the *O'Brien* test. Thus, *Tinker*, not *O'Brien*, sets the constitutional standard for the Plano Independent School District's policy broadly prohibiting student expression during the school day. Both the terms of the *O'Brien* test and this Court's precedents make clear that application of *O'Brien* is inappropriate in the context of regulations of pure speech of public school students.

A. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT THAT CONSISTENTLY HAVE RECOGNIZED THE *TINKER* STANDARD AS THE GENERAL RULE APPLICABLE TO RESTRICTIONS OF PURE SPEECH IN THE PUBLIC SCHOOL SETTING.

This Court has applied the *O'Brien* test to expressive *conduct* since its inception in 1968. When faced with government regulations of *pure speech by public school students*, however, the Court has never utilized the *O'Brien* test. Rather, this Court has consistently employed the *Tinker* standard.

Just two terms after issuing the decision in *O'Brien*, this Court decided a case involving a restriction on student expression in a public school.

In *Tinker v. Des Moines Independent School District*, the Court addressed the constitutionality of a school regulation prohibiting students from expressing their political views through their clothing. The students penalized under the policy had worn armbands for the express purpose of protesting hostilities in Vietnam. *Id.* at 504. Importantly, the Court did *not* apply the test it had recently established in *O'Brien*. Instead, the Court described the students' expressive activity as "closely akin to 'pure speech,'" *id.* at 505 (and thus, as explained *infra*, beyond the purview of *O'Brien*). Citing "the special characteristics of the school environment," 393 U.S. at 506, the Court held that "in the area where students in the exercise of their First Amendment rights collide with the rules of the school authorities," *id.* at 507, a student "may express his opinions, even on controversial subjects . . ., if he does so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others." *Id.* at 513.

The *Tinker* Court thus made clear that the starting point for analysis of student speech regulations is exactly the opposite of the starting point under *O'Brien*. Instead of asking whether conduct not otherwise within the parameters of free speech is nonetheless deserving of constitutional protection by virtue of its expressive nature (as *O'Brien* inquires), the question under *Tinker* is whether private student speech, which is presumptively safeguarded against government infringement by the Free Speech Clause of the First

Amendment, is sufficiently disruptive of the proper functioning of the government (school) to fall outside that protection.

The Court's position was clear: the "special characteristics" of the public school setting give rise not only to unique and important governmental interests but also to the need for "vigilant protection of constitutional freedoms," *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), such that regulation of the free speech rights of students is to be scrutinized under a more demanding rule—the *Tinker* standard—rather than "*O'Brien*'s relatively lenient standard." *Texas v. Johnson*, 491 U.S. at 407.

The Court next addressed a restriction of student speech in *Bethel School District v. Fraser*, 478 U.S. 675 (1986), involving a school's discipline of a student based on a speech he delivered to a school-wide audience. While the *Fraser* Court rejected the student's First Amendment challenge, it expressly reaffirmed *Tinker*'s holding that public school students retain their free speech rights even while on campus. *Id.* at 680. According to the Court, the result in favor of the school was warranted by the "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of [the student's] speech in this case . . . ." *Id.* Again, as in *Tinker*, the Court did *not* apply *O'Brien*.

Two years after the *Fraser* decision, the Court again faced a First Amendment challenge to a school's regulation of student speech. In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the school principal directed a faculty adviser to withhold two student-written articles from publication in the school newspaper. The students

filed suit alleging violation of their free speech rights. While the Court ruled that *Kuhlmeier* involved student speech occurring entirely within the confines of a school-sponsored, curricular setting, and thus turned on a question entirely distinguishable from that in *Tinker*, the *Kuhlmeier* Court, like the *Fraser* Court before it, reaffirmed the applicability of the *Tinker* standard to pure speech by public school students.

The *Kuhlmeier* Court characterized the issue in *Tinker*—pure student speech resulting solely from the student's decision to communicate his own message—as involving "[t]he question whether the First Amendment requires a school to *tolerate* particular student speech," *Id.* at 270 (emphasis added). Put another way, this "question addresses educators' ability to *silence* a student's personal expression that happens to occur on the school premises." *Id.* at 271 (emphasis added). Thus, the Court continued to recognize "the standard articulated in *Tinker*"—not the *O'Brien* test—as the general rule "for determining when a school may punish student expression," *id.* at 272, initiated not for curricular or other official school purposes but solely for purposes of interpersonal communication.

Most recently, this Court addressed the validity, under the First Amendment, of a school's decision to punish or restrict student speech in *Morse v. Frederick*, 127 S. Ct. 2618 (2007). In *Morse*, the Court confronted a First Amendment challenge to a principal's decision to suspend a student for displaying, at a school-supervised event, a banner appearing to advocate illegal drug use. Just like the *Fraser* and *Kuhlmeier* Courts, the *Morse* Court

began by reaffirming *Tinker*'s holding that "students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Id.* at 2622 (quoting *Tinker*, 393 U.S. at 506). The Court simply explained that the *Tinker* rule is not "absolute," *id.* at 2627, when, "in light of the special characteristics of the school environment," *Tinker*, 393 U.S. at 506, student speech implicates "serious and palpable" dangers. *Morse*, 127 S. Ct. at 2629. As in *Fraser*, the *Morse* Court concluded that the proper functioning of the school (there, protecting students through its policy prohibiting advocacy of illegal drug use) outweighed the student's right to engage in his choice of personal expression on the school campus (there, speech appearing to advocate illegal drug use). Notably, as in *Tinker*, *Fraser*, and *Kuhlmeier*, the Court did *not* apply the *O'Brien* test.

Taken together, this Court's student speech cases consistently have recognized that the general rule applicable to a restriction of student speech on the public school campus is *Tinker*'s "material and substantial interference" test, which requires a school, when attempting to "alter[] the usual free speech rights" of public school students, *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring), to identify a concrete danger to "some special characteristic of the school setting," *id.*, that would justify the restriction. In other words, when a school's challenged policy "does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment," *Tinker*, 393 U.S. at 507-08, but instead "involves direct, primary First Amendment rights . . .," *id.*, including "pure speech" such as the distribution of written materials during non-instructional time, a

heightened standard of scrutiny is required to afford adequate protection to students' speech rights.

The application of *O'Brien* by the Fifth Circuit here thus sharply departs from this Court's instructions in *Tinker* and fails to strike the appropriate balance between the school's legitimate interests in order and discipline and the constitutional freedoms to which public school students are entitled. It is difficult indeed to view the speech policy at issue here as anything short of the school district's attempt to wrest students' First Amendment speech rights "at the schoolhouse gate." Because the decision below departs from this Court's precedents on the governing constitutional standard, this decision exerts a profoundly unsettling effect upon the law. This Court should therefore grant review.

B. THE DECISION BELOW MARKS A DEPARTURE FROM THIS COURT'S DECISIONS WHICH CLARIFY THAT THE PURPOSE OF THE *O'BRIEN* TEST IS TO ANALYZE RESTRICTIONS IMPOSED ON EXPRESSIVE CONDUCT, NOT PURE SPEECH.

As the Court enunciated the standard in *O'Brien*, "when 'speech' and 'nonspeech' elements are combined in the same course of *conduct*, a sufficiently important governmental interest in regulating the *nonspeech* element can justify *incidental* limitations on First Amendment freedoms." 391 U.S. at 376 (emphasis added). By its own terms, the *O'Brien* test is intended only for

application to physical *conduct*—like burning a flag or draft card—that is intended to express an idea. Further, *O'Brien* applies only when any restrictions on First Amendment freedoms—such as the exercise of "pure speech"—are *incidental*. Thus, the *O'Brien* test is relevant for determining whether activity not otherwise constitutionally protected should nevertheless be afforded protection under the First Amendment because of its expressive nature. It is entirely inapposite where, as here, pure speech—the written or spoken word—is the intended target of the regulation.

This Court first announced the *O'Brien* test in 1968 in the context of the destruction of a selective service registration certificate. *O'Brien*, 391 U.S. 367. The Court distinguished between "speech," on the one hand, which enjoys full protection under the First Amendment, and "conduct intend[ed] . . . to express an idea," *id.*, which enjoys such protection only when it is restricted *because of* its expressive nature, and the government fails to demonstrate that the restriction serves a sufficiently important interest. Applying this standard to O'Brien's conduct, the Court held that the government's interests in prohibiting the "independent noncommunicative" element—destruction of the draft card—was sufficient to outweigh any *incidental* restriction on the exercise of O'Brien's First Amendment rights—the communication of his anti-war message. *Id.* at 382. Subsequent decisions of this Court have likewise recognized that *O'Brien* applies to *conduct*, as distinguished from pure speech. *See, e.g., Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 65-66 (2006); *McConnell v.*

FEC, 540 U.S. 93, 250 (2003); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001).

By contrast, the instant case centers on a school district's *direct* and *intentional* regulation of the written word, a means of communication this Court has labeled "pure speech," which falls squarely within the protections of the First Amendment. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 404 (1989) (recognizing distinction between "speech," which clearly encompasses dissemination of the "written word," and "conduct," which is "intend[ed] . . . to express an idea"); *Tinker*, 393 U.S. at 505-06 ("'pure speech' . . ., we have repeatedly held, is entitled to comprehensive protection under the First Amendment") (citing *Cox v. Louisiana*, 379 U.S. 536, 555 (1965); *Adderley v. Florida*, 385 U.S. 39 (1966)).

This Court has expressly acknowledged that "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting *the written* or spoken *word*." *Johnson*, 491 U.S. at 406 (emphasis added). Because this Court has "limited *O'Brien*'s relatively lenient standard" to "regulations of noncommunicative *conduct*," that are "unrelated to the suppression of free expression," *id.* at 403, 407 (emphasis added) (quoting *O'Brien*, 391 U.S. at 377), its application by the Fifth Circuit to a school policy restricting pure student speech marks a sharp departure from this Court's relevant decisions.

CONCLUSION

Because the decision below departs from and conflicts with controlling precedent from this Court, the Court should grant the petition for certiorari.

Respectfully submitted,

Jay Alan Sekulow
Counsel of Record
Walter M. Weber
Carly F. Gammill
American Center for Law & Justice
201 Maryland Avenue, N.E.
Washington, DC 20002
(202) 546-8890
sekulow@aclj.org
Counsel for Amicus Curiae

April 19, 2010

Supreme Court, U.S.
FILED
APR 19 2010
OFFICE OF THE CLERK

No. 09-1131

In the
Supreme Court of the United States

DOUG MORGAN; ROBIN MORGAN; JIM SHELL; SUNNY SHELL; SHERRIE VERSHER; AND CHRISTINE WADE,
Petitioners,

v.

PLANO INDEPENDENT SCHOOL DISTRICT, et al.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICI CURIAE* OF CHARLES BARUCH, WALKER BATEMAN IV, AND WALLBUILDERS, INC.

in support of the *Petitioners*.

Steven W. Fitschen
Counsel of Record
Douglas E. Myers
The National Legal Foundation
2224 Virginia Beach Blvd.,
Suite 204
Virginia Beach, VA 23454
(757) 463-6133

Charles "Chad" Baruch
Law Office of Chad Baruch
3201 Main Street
Rowlett, TX 75088
(972) 412-7192
(770) 339-0774

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. THIS COURT SHOULD GRANT THE WRIT TO CLARIFY AND UNIFY THE FEDERAL CASE LAW CONCERNING STUDENT SPEECH RIGHTS. 4

II. THIS COURT SHOULD GRANT THE WRIT TO CLARIFY THAT *TINKER* CONTROLS STUDENT SPEECH CASES BECAUSE IT PROVIDES THE CLEAREST AND MOST APPROPRIATE STANDARD FOR SCHOOL PRINCIPALS TO USE. 5

A. The *Tinker* Standard is Easily Understood and Applied by School Principals, and Permits Them All the Power Necessary to Maintain Order. 5

B. *Tinker* Allows for Proper Maintenance of Order within the School While Still Respecting the

Constitutional Rights of the Students. 8

III. THIS COURT SHOULD GRANT THE WRIT BECAUSE THE FIFTH CIRCUIT'S DECISION REMOVES ANY LIMITATION ON SCHOOL AUTHORITY TO STIFLE STUDENT EXPRESSION. 9

CONCLUSION 11

TABLE OF AUTHORITIES

Cases: **Page(s)**

Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986) 4

Brown v. Bd. of Educ., 347 U.S. 483 (1954) 6

Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006) 7

Hazelwood v. Kuhlmeier, 484 U.S. 260 (1988) 4

Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118, 9 F.3d 1295 (7th Cir. 1993) 7

Morse v. Frederick, 127 S. Ct. 2618 (2007) 4

Tinker v. Des Moines Inde.t Comty. Sch. Dist., 393 U.S. 503 (1969) 2-7, 9-11

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) 8, 11

Other Sources:

Kathryn A. Agard, *Learning to Give*, Principal Leadership, Sept. 2004 9

Pet. for Writ of Cert. 4, 10

Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. Chi. L. Rev. 131 (1995)..... 8

INTEREST OF *AMICI CURIAE*[1]

Walker Bateman IV is a former school board member in the Highland Park Independent School District in Highland Park, Texas. Located in Dallas, HPISD's total student enrollment for the 2009-2010 school year is around 6,400, including a high school of approximately 1,900 students.

Charles "Chad" Baruch is an administrator at Yavneh Academy of Dallas, a private high school in Dallas. He previously served as a teacher or coach in large public high schools in South Dakota, Minnesota, and Wisconsin.

Mr. Bateman and Mr. Baruch are concerned about the constitutional and educational implications of the Fifth Circuit's decision. They worry that the public education community, hesitant to oppose one of its own members and adopting a "circle the wagons" mentality, may not completely or accurately explain those implications to this Court. Mr. Bateman and Mr. Baruch tender this Brief solely to help this Court understand the issues presented in this case, offering the perspective of high school administrators working "in the trenches"

---

[1] The parties received timely notice pursuant to this Court's Rule 37 (2) a and have consented to the filing of this Brief. Copies of the letters of consent accompany this Brief. No counsel for any party has authored this Brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this Brief. No person or entity has made any monetary contribution to the preparation or submission of this Brief, other than the *Amici Curiae* and their counsel.

of American public education.[2]

Amicus WallBuilders, Inc., also has an interest in the constitutional and educational implications of the Fifth Circuit's decision. WallBuilders' President, David Barton, is a recognized authority in American history and the role of religion in public life. As a result of his expertise in these areas, he works as a consultant to national history textbook publishers. He has been appointed by the State Boards of Education in states such as California and Texas to help write the American history and government standards for students in those states. Mr. Barton also consults with Governors and State Boards of Education in several states, and he has testified in numerous state legislatures on American history. Much of his knowledge is gained through WallBuilders' vast collection of rare, primary documents of American history, including more than 70,000 documents predating 1812. Lastly, due to his expansive work and knowledge in American history, Mr. Barton has received numerous national and international awards that have distinguished him as a leading scholar in his field.

SUMMARY OF THE ARGUMENT

America's principals need this Court's help. As the result of a nationwide effort by school boards and

---

[2] Although Mr. Bateman and Mr. Baruch are not themselves administrators in the public schools, their combined experiences within the public and private school systems have afforded them insight into the unique problems associated with handling matters of student speech.

their association attorneys to have circuit courts discard *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the standard governing student speech rights is hopelessly muddled. And if federal judges and legal scholars cannot agree on the applicable standard, what chance do principals have?

This Court should not countenance uncertainty in this area of the law; instead, this Court should grant certiorari to provide principals with a clear statement of the standard governing student speech, permitting principals to return their focus to academic success and alleviating their present burden of having to asses competing legal standards enunciated by lower courts.

Mr. Bateman, Mr. Baruch, and WallBuilders, Inc., make three arguments in support of the Petition for Writ of Certiorari. First, the Fifth Circuit's decision deepens the already substantial confusion surrounding student speech rights. If this Court does not address that confusion, high school principals and students will continue to suffer from a lack of clear guidance and needless litigation will result. Second, *Tinker* provides a straightforward standard easily understood by high school principals (who deal every day with preventing school disruption, but likely lack experience with content-neutrality) and permits principals all the leeway necessary to maintain school order. *Tinker* is the only standard that grants principals that leeway while still respecting the constitutional rights afforded to students—and harmonizing school discipline with the important role that America's

public schools play in preparing students to function as informed citizens in our democratic system. Third, the Fifth Circuit's ruling removes any meaningful limitations on the authority of school officials to suppress student expression, and will lead to a host of overly restrictive school policies squelching students' First Amendment rights.

ARGUMENT

I. THIS COURT SHOULD GRANT THE WRIT TO CLARIFY AND UNIFY THE FEDERAL CASE LAW CONCERNING STUDENT SPEECH RIGHTS.

For years, high school administrators and students assumed that *Tinker* governed all student speech (except speech covered by the narrow exceptions carved out in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988), and *Morse v. Frederick*, 127 S. Ct. 2618 (2007)). Over the past decade, that certainty has yielded to growing confusion and—more recently—disagreement among the circuit courts. Consequently, principals across the country are left to harmonize and apply competing legal standards to student speech issues. The time has come for this Court to clarify to school administrators the standard applicable to student speech.

Even legal scholars struggle to make sense of the various standards enunciated by the circuit courts, noting the "debate" over *Tinker*'s applicability to content-neutral restrictions (*See* Petition for Writ of Cert. at 21, and citations therein). Indeed, the

district court certified its judgment in this case for the Fifth Circuit to clarify the applicable legal standard. (App. 22.)

If legal scholars and federal judges are uncertain of the proper standard, where does that leave principals? Too often, trying to sort out conflicting federal opinions, or wasting time seeking legal counsel for cases involving student expression (assuming they work in a district large enough to have legal counsel, but small enough to make counsel accessible to administrators). At best, this is an unacceptable diversion of attention away from the already difficult task of promoting academic excellence. At worst, it perpetuates needless lawsuits between American students and their schools. Preventing either of these scenarios is reason enough for this Court to grant certiorari.

II. THIS COURT SHOULD GRANT THE WRIT TO CLARIFY THAT *TINKER* CONTROLS STUDENT SPEECH CASES BECAUSE IT PROVIDES THE CLEAREST AND MOST APPROPRIATE STANDARD FOR SCHOOL PRINCIPALS TO USE.

A. The *Tinker* standard is easily understood and applied by school principals, and permits them all the power necessary to maintain order.

Forty years ago, this Court struck exactly the right balance between the need for administrators to

maintain order in America's public schools and the need for young Americans to learn to function as citizens in a vibrant democracy by exercising their First Amendment liberties. In *Tinker*, this Court made clear to administrators and students alike that:

- political speech does not lose its constitutional protection simply because it is exercised by a student attending—often under threat of criminal sanction for non-attendance—one of America's public schools, but that

- students may not rely on the First Amendment to disrupt the educational process or infringe on the rights of their classmates.

Tinker was to student expression and political participation what *Brown v. Board of Education*, 347 U.S. 483 (1954), was to student equal-opportunity. It reaffirmed that a core value of the Constitution does not cease to exist in America's public schools.

Tinker provides a standard uniquely well-suited to principals. Most American public school principals lack experience with the intricacies of *content-neutrality* or *least-restrictive means*. But they understand disruption. They *live* disruption. The average American principal can easily forecast the likelihood of a particular act or event causing substantial and material disruption. That is a call principals are asked to make time and again in the

exercise of their duties.

Tinker affords principals ample leeway to maintain school order. *Tinker* permits school administrators to control student speech that "materially and substantially disrupt[s] the work and discipline of the school," or causes "substantial disorder or invasion of the rights of others." *Tinker*, 393 U.S. at 513.

Although the phrase "invasion of the rights of others" has been used differently by various circuit courts, *see e.g. Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006), and *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295 (7th Cir. 1993), its application here is unnecessary—the religious speech at issue did not invade the rights of other students. A student's benign expression of religious belief does not attack other students. And the suppression of religious expression—which the Founders singled out for protection—is an inappropriate means of appeasing other students (or their parents) who are offended that some students have religious faith and choose to talk about it.

With the exception of lewd, obscene, or school-sponsored speech, or speech that advocates illegal drug use, a school has no legitimate reason for censoring student speech. *Tinker* permits principals to address these situations, vesting them with unfettered power to stifle *all* student expression likely to interfere materially with the educational process. Any greater power fails to serve a legitimate educational purpose.

B. *Tinker* Permits Maintenance of Order within the School While Still Respecting the Constitutional Rights of Students.

This Court "has long recognized what none of us can doubt: education is vital to citizenship in a democratic republic." Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. Chi. L. Rev. 131, 131 (1995). America's public schools are charged with inculcating in students an understanding of and appreciation for the principles of the Constitution.

When a school stifles speech—especially speech not even arguably impeding the school's educational mission—it is antithetical to teaching the value of free expression. Constitutional socialization requires scrupulous protection of student free expression "if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

The core role schools play in citizenship is beyond doubt. In September 2004, the National Association of Secondary School Principals, a professional organization comprised of more than 30,000 middle and high school administrators, devoted an entire issue of its national magazine, *Principal Leadership*, to the topic of "Making Civics

Real." According to one article in that issue:

> Creating informed, engaged citizens who are knowledgeable voters and active participants in both the democratic process and their communities may be *our single-most important mission as educators.*

Kathryn A. Agard, *Learning to Give*, Principal Leadership, Sept. 2004, at 43, 46 (emphasis added).

Education—or at least effective education—is not something that the school does *to* the student. Rather, education involves an interactive process revolving around a free exchange of ideas. And—contrary to Plano ISD's policy— this free exchange of ideas should not be limited to the classroom; it should take place in the cafeteria, the commons, the library, and the locker room. As this Court has cautioned, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the 'marketplace of ideas.'" *Tinker*, 393 U.S. at 512 (quoting *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967)). Stifling student speech without cause undercuts this goal and leaves students unprepared to participate in our nation's political system.

III. THIS COURT SHOULD GRANT THE WRIT BECAUSE THE FIFTH CIRCUIT'S DECISION REMOVES ANY LIMITATION ON SCHOOL AUTHORITY TO STIFLE STUDENT EXPRESSION.

Explaining away *Tinker* as being about an effort "to silence the student because of the particular viewpoint he expressed," the Fifth Circuit adopted a standard that gives the Government a free hand to stifle virtually all student speech. Under this curious standard, the more speech the Government bans, the less scrutiny is applied to the Government's censorship.

The substantial experience of the *Amici Curiae* in public education leaves them with little doubt the Fifth Circuit's decision—if permitted to stand—will result in a host of restrictive speech policies across the American Southwest. The notion of unfettered Government power to restrict the speech of any class of citizens should send chills up the spine of anyone concerned about governmental intrusion into matters of conscience.

The Petition for Writ of Certiorari actually understates the potential danger of this intrusion by claiming school officials will likely ban only "disfavored" messages. In fact, school officials are likely to go much further, and ban all messages—favored or disfavored—with potential to engender any small degree of controversy.

This case demonstrates the potential for such oppressive censorship. Correctly forecasting the Fifth Circuit's casting aside of *Tinker*, Plano ISD has attempted to banish religious expression from its schools. And the targeted expression actually is the majority viewpoint, Christianity. Plano ISD attempted to ban the expression not because the majority disfavors it, but because it might trigger

dissent. Where the school district's concern should have been the scrupulous protection of its students rights to express their personal religious beliefs, it instead chose to suppress that expression.

Tinker expressly and appropriately rejected this type of message-control by stating that "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved." *Tinker*, 393 U.S. at 511. As Justice Jackson so famously put it: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . matters of opinion . . . ." *Barnette*, 319 U.S. at 642.

CONCLUSION

The Fifth Circuit's decision grants authority to principals far exceeding the power necessary to maintain school order. Instead, the Fifth Circuit has provided principals with infinitely-elastic power to stifle student expression in violation of the First Amendment. Judicial deference to educators is important, but not at the expense of the Constitution. School administrators are asked to perform a daunting arrays of tasks, but "none that they may not perform within the Bill of Rights." *Barnette*, 319 U.S. at 637.

This Court should grant the Petition for Writ of Certiorari to reaffirm the balance between

maintaining school order and protecting students' constitutional rights necessary to ensure a

generation prepared to lead this nation into the middle of the twenty-first century.

Respectfully submitted,
this 19th day of April 2010,

Steven W. Fitschen
Counsel of Record for *Amicus Curiae*
Douglas E. Myers
The National Legal Foundation
2224 Virginia Beach Blvd., Ste. 204
Virginia Beach, Virginia 23454
(757) 463-6133

Charles "Chad" Baruch
The Law Office of Chad Baruch
3201 Main Street
Rowlett, Texas 75088
(972) 412-7192

Supreme Court, U.S.
FILED
APR 19 2010

No. 09-1131

IN THE
Supreme Court of the United States

DOUG MORGAN; ROBIN MORGAN; JIM SHELL; SUNNY SHELL; SHERRIE VERSHER; AND CHRISTINE WADE,

PETITIONERS,

V.

PLANO INDEPENDENT SCHOOL DISTRICT, ET AL.,

RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR CATO INSTITUTE, BECKET FUND FOR RELIGIOUS LIBERTY, AND NATIONAL ASSOCIATION OF EVANGELICALS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

ILYA SHAPIRO
KATY NOETH
CATO INSTITUTE
1000 Mass. Ave., NW
Washington, DC 20001
(202) 842-0200

DAVID J. SCHENCK
Counsel of Record
ROBERT S. HILL
RICHARD D. SALGADO
ANDREW O. WIRMANI
JONES DAY
2727 North Harwood Street
Dallas, TX 75201-1515
dschenck@jonesday.com
Telephone: (214) 220-3939
Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

INTERESTS OF THE *AMICI* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. This Court's Precedent Fully Serves All Legitimate Interests Of School Administrators In Restricting Speech, Whereas the Fifth Circuit's Standard Invites Incremental Abolition Of Students' Speech Rights. 2

A. Tinker And Its Progeny Already Provide School Administrators The Authority To Restrict All Speech That They Have A Legitimate And Constitutional Interest In Restricting. 2

1. An Interest In Avoiding Controversy And/Or Avoiding The Task Of Exercising Judgment Is Not A Legitimate Justification For The Suppression Of Protected Speech. 4

2. Enacting A Sweeping Ban On All Written Speech Is Antithetical To The First Amendment. 5

3. Even In The Absence Of Pretext, Such A Broad But Facially Neutral Restriction On Student Speech Is Unconstitutional. 8

TABLE OF CONTENTS
(continued)

Page

B. The "Material And Substantial Disruption" Exception To Tinker Is A Flexible Standard That Sufficiently Accommodates Disparities Between Students, Such As Age And Grade Level. 10

C. Permitting A Wholesale Content- And Viewpoint-Neutral Ban On All Speech Or A Form Of Speech As An Alternative To The Tinker Standard Will Result In The Erosion And Eventual Elimination Of Student Speech In School At Great Cost To Societal Interests..... 12

1. Schools Will Use Broad, Facially Neutral Bans On Speech As A Pretext To Target Religious And Political Speech..... 13

2. Broad Bans On Student Speech Will Have A Detrimental Societal Effect..... 15

II. The Distribution of The Written Word Lies At The Heart Of The First Amendment..... 16

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Ambach v. Norwick,
441 U.S. 68 (1979) 15

Board of Education, Island Trees Union Free School District No. 26 v. Pico,
457 U.S. 853 (1982) 15

Board of Education v. Mergens,
496 U.S. 226 (1990) 14

Bethel School District No. 403 v. Fraser,
478 U.S. 675 (1986) 2, 9, 15

Brown v. Board of Education,
347 U.S. 483 (1954) 15

Capitol Square Review & Advisory Board v. Pinette,
515 U.S. 753 (1995) 13

Chaplinksy v. New Hampshire,
315 U.S. 568 (1942) 9

City of Houston v. Hill,
482 U.S. 451 (1987) 4

City of Ladue v. Gilleo,
512 U.S. 43 (1994) 9

TABLE OF AUTHORITIES
(continued)

Page

Good News Club v. Milford Central School,
533 U.S. 98 (2001) 14

Hazelwood School District v. Kuhlmeier,
484 U.S. 260 (1998) 3

Hedges v. Wauconda Community Unit School District No. 118,
9 F.3d 1295 (7th Cir. 1993) 11

Hill v. Colorado,
530 U.S. 703 (2000) 7

Ingraham v. Wright,
430 U.S. 651 (1977) 4

Jamison v. Texas,
318 U.S. 413 (1943) 9

Keyishian v. Board of Regents,
385 U.S. 589 (1967) 15

Lamb's Chapel v. Center Moriches Union Free School District,
508 U.S. 384 (1993) 7, 14

Lovell v. City of Griffin,
303 U.S. 444 (1938) 9

TABLE OF AUTHORITIES
(continued)

Page

Martin v. City of Struthers,
319 U.S. 141 (1943) 9

McCreary County v. ACLU of Kentucky,
545 U.S. 844 (2005) 7

Miller v. California,
413 U.S. 15 (1973) 9

Morse v. Frederick,
551 U.S. 393 (2007) 3

Nurre v. Whitehead,
580 F.3d 1087 (9th Cir. 2009) 6

Safford Unified School District #1 v. Redding,
129 S. Ct. 2633 (2009) 5

Schad v. Mount Ephraim,
452 U.S. 61 (1981) 9

Schneider v. State,
308 U.S. 147 (1939) 9

Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969).. ..... *passim*

United States v. O'Brien,
391 U.S. 367 (1968) 2, 8, 16

TABLE OF AUTHORITIES
(continued)

Page

Vernonia School District 47J v. Acton,
515 U.S. 646 (1995) 11

West Virginia State Board of Education v. Barnette,
319 U.S. 624 (1943) 15, 16

Widmar v. Vincent,
454 U.S. 263 (1981) 14

OTHER AUTHORITIES

Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 Harv. C.R.-C.L. L. REV. 31 (2003) 8

Douglas Laycock, *High-Value Speech and the Basic Educational Mission of a Public High School: Some Preliminary Thoughts*, 12 LEWIS & CLARK L. REV. 111, 123-24 (2008) 13, 14

Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 454 (1996) 8

INTERESTS OF THE *AMICI*[1]

The amici joining in this brief are not-for-profit organizations committed to protecting essential liberties of the American people. More detailed statements describing each amicus are set forth in an Appendix.

SUMMARY OF THE ARGUMENT

In *Tinker v. Des Moines Independent Community School District*, this Court made clear that students enjoy First Amendment rights, and that core political and religious speech cannot be suppressed absent a showing that the speech will "materially and substantially disrupt" the educational process. Over the ensuing forty years, the Court has repeatedly reaffirmed this central holding ensuring a respectful dialogue in the public schools on issues of public concern. Having excepted disruptive speech from the scope of First Amendment protection, *Tinker* and its progeny afford school administrators ample authority to assure the integrity of the learning environment—at all grade levels—while also balancing those needs with the speech rights of students. In contrast, the Fifth Circuit's approach, ostensibly applying the time,

---

[1]The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of the intention of Amici Curiae to file this brief. Pursuant to Supreme Court Rule 37.6, counsel for amici certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than amici, their members, and their counsel has made a monetary contribution to the preparation and submission of this brief.

place, and manner standard set forth in *United States v. O'Brien* for mixed conduct and speech, casts aside any pretense of balance and permits schools to enforce sweeping speech prohibitions by which all or virtually all student speech may be prohibited. Indeed, the school policy at issue in this case underscores the fact that even pure written speech—which embodies the very essence of the First Amendment—is included in this unnecessarily broad approach. Such speech is critical to the development of responsible discourse among our nation's youth.

ARGUMENT

I. THIS COURT'S PRECEDENT FULLY SERVES ALL LEGITIMATE INTERESTS OF SCHOOL ADMINISTRATORS IN RESTRICTING SPEECH, WHEREAS THE FIFTH CIRCUIT'S STANDARD INVITES INCREMENTAL ABOLITION OF STUDENTS' SPEECH RIGHTS.

A. *Tinker* And Its Progeny Already Provide School Administrators The Authority To Restrict All Speech That They Have A Legitimate And Constitutional Interest In Restricting.

While this Court has made it clear that students in public schools enjoy First Amendment rights, *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 511 (1969), it has *also* recognized the unique needs of the education environment by affording school officials the authority to restrict any student speech that officials reasonably believe will "materially and substantially disrupt the work and discipline of the school," *id.* at 513, that is "lewd" or "vulgar," *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S.

675, 685 (1986), or that may be reasonably viewed as advocating unlawful drug use, *Morse v. Frederick*, 551 U.S. 393, 410 (2007). The Court has also recognized that school officials have a heightened interest in regulating student speech whenever that speech carries the imprimatur of the school itself. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1998). Through these cases, the Court has established a workable framework that accounts for the needs of educators to maintain order in their classrooms, while also recognizing the unquestioned First Amendment rights that students carry with them into the schoolhouse. But none of these refinements of *Tinker* have threatened the basic rule that non-disruptive student speech on core First Amendment topics is protected.

Under the present framework, a school district such as Plano Independent School District ("PISD") could constitutionally impose a ban on all student speech that it considers to be "materially and substantially disruptive," as well as all speech that is "lewd" or "vulgar," or which advocates unlawful drug use, and it could carefully regulate school-sponsored speech. By process of elimination, all *remaining* speech would be constitutionally protected. In short, it would be the speech—including core religious and political speech—that the school lacks any legitimate interest in restricting.

The only conceivable objectives that a school district could advance by enacting a more comprehensive, content- and viewpoint-neutral ban affecting *all* student speech such as the policy enacted by PISD in this case would be (1) to insulate

school administrators from the effort and potential controversy of having to exercise judgment in determining what speech is disruptive, or (2) to enable school administrators to regulate a particular category of speech that they would be otherwise unable to constitutionally restrict. Both of these objectives violate *Tinker* and undermine the First Amendment.

1. An Interest In Avoiding Controversy And/Or Avoiding The Task Of Exercising Judgment Is Not A Legitimate Justification For The Suppression Of Protected Speech.

As this Court observed in *Tinker*, "an urgent wish to avoid the controversy which might result from the expression," cannot justify stripping public school students of their First Amendment rights. 393 U.S. at 509-10. Similarly, this Court has held that difficulties in drafting narrow rules do not justify the government adopting sweeping restrictions. *City of Houston v. Hill*, 482 U.S. 451, 465 (1987). An administrator's unwillingness to craft a constitutionally proper restriction on disruptive student speech—whether to save time or to avoid making unpopular decisions—thus does not justify the adoption of a blanket prohibition.

Administrators can no more avoid their obligation to respect the speech rights of those who are compelled into their care, than they might avoid the burden and awkwardness of having to conduct a hearing before or after imposing serious discipline (*e.g.*, *Ingraham v. Wright*, 430 U.S. 651 (1977)) or the

inconvenience of refraining from intrusive searches absent actual, reasonable suspicion of misconduct. (*e.g.*, *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633 (2009)). Convenience for those in positions of authority is not the defining objective of the Bill of Rights. While the educational setting is admittedly unique, it is not beyond the reach of the Constitution, as *Tinker* itself made plain.

2. Enacting A Sweeping Ban On All Written Speech Is Antithetical To The First Amendment.

According to the current Fifth Circuit precedent, the problem with the high school's policy in *Tinker* was that it did not go far enough. If the school administrators had simply banned *all* symbolic student speech, rather than singling out the arm bands, the policy would have been—under the Fifth Circuit's current standard—a permissible content- and viewpoint-neutral restriction. Such a conclusion produces an all-or-nothing scenario that encourages school administrators to simply outlaw *all* speech in order to get rid of the protected speech they disfavor—whether it is political speech, religious speech, or some other expression contrary to the whims of the principal, school board, or dominant preference of the community. If that had been the holding in *Tinker*, one can only imagine that it would have resulted in the widespread adoption of all-encompassing, but content- and viewpoint-neutral bans on student speech at schools nationwide during the volatile 1970s, resulting in the suppression of the speech of an entire generation.

The approach now favored by the Fifth Circuit and some other lower courts is far more than an exception to *Tinker*; it is a transformation. While some Circuits may have merely implied a basis for wide-ranging, albeit back-handed, censorship of student speech that expresses controversial ideas, *see, e.g., Nurre v. Whitehead*, 580 F.3d 1087 (9th Cir. 2009), the Fifth Circuit has gone even further and fully endorsed the wholesale suppression of an entire category of written speech.

The Fifth Circuit's proposed "exception" thus represents an altogether new rule under which even core political speech that poses no discernible threat of disruption can be completely and thoroughly driven off school grounds at the convenience of administrators, so long as it is grouped with all other student speech of the same category. This promotion of deliberate over-breadth is in direct conflict with this Court's precedent, strips away the basic rights previously guaranteed to students (so long as all students are denied those rights), and invites school administrators to use neutrality as a pretext to suppress disfavored political and religious speech.

The history of this litigation demonstrates how a school district, emboldened by the Fifth Circuit, can use a broad "content- and viewpoint-neutral" restriction as a pretext to censor disfavored religious speech. PISD's original student speech policy afforded school officials virtually unfettered discretion to suppress the distribution of written materials by students. App. to Pet. Cert. 95. And school officials specifically used that discretion to root out all remnants of student religious speech. Pet.

Cert. 5-8. When that policy was challenged, PISD shifted to yet another extreme, enacting an amended policy that purportedly bans the exchange of virtually all written materials. App. 98, 103.

The PISD's new policy was apparently "presented only as a litigating position" and serves to confirm both its intention to suppress controversial speech and its preference to evade critical scrutiny of that intention. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 871 (2005). Given the scope of this new policy, it seems highly unlikely that even PISD believes that it is capable of being fully enforced. Any effort at partial enforcement is almost certain to be directed at the more controversial religious and political speech protected at the First Amendment's core. While *Tinker* would permit that and other speech to be constrained *to the extent it is disruptive,* no decision of this Court has endorsed the exclusion of religion or controversial, if nondisruptive, speech from the public schools. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.,* 508 U.S. 384 (1993).

Indulging the notion that PISD actually intends to enforce its new policy does little to save it. The only meaningful difference between the PISD former and new policies is that it has now sacrificed its own discretion to permit speech that it favors—such as, perhaps, passing out Dallas Cowboys bumper stickers during football season—in the interest of what it evidently perceives to be the greater need to prohibit non-disruptive religious and other protected speech. This is directly contrary to the First Amendment. *See Hill v. Colorado*, 530 U.S. 703, 767 (2000) (Kennedy, J., dissenting) ("Clever

content-based restrictions are no less offensive than censoring on the basis of content."); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 454 (1996) ("Officials may care so much about suppressing a particular idea affected by a content-neutral law as to disregard or tolerate the law's other consequences."); *see generally*, Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 Harv. C.R.-C.L. L. REV. 31 (2003).

While facially neutral, the amended policy in this case is merely a pretext that permits school officials to do precisely what they could not constitutionally do under the original policy: suppress otherwise protected speech. Put simply, school districts should not be permitted to use the guise of neutrality to "avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509.

3. Even In The Absence Of Pretext, Such A Broad But Facially Neutral Restriction On Student Speech Is Unconstitutional.

Even without the pretext discussed above, the broad bans sanctioned by the Fifth Circuit are unconstitutional. In effect, the Fifth Circuit's adoption of *O'Brien* over *Tinker* invites school administrators to solve problems with widespread carpet bombing instead of the pinpoint strikes mandated by *Tinker*. The collateral damage to the

core rights protected by the First Amendment is both excessive and avoidable.

The policies at issue in this case can be loosely analogized to the attempts of municipalities to completely ban entire mediums of expression. This Court has held ordinances invalid that completely banned the distribution of pamphlets within a municipality, *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938); handbills on public streets, *Jamison v. Texas*, 318 U.S. 413, 416 (1943); door-to-door distribution of literature, *Martin v. City of Struthers*, 319 U.S. 141, 145-49 (1943); *Schneider v. State*, 308 U.S. 147, 164-65 (1939); and live entertainment, *Schad v. Mount Ephraim*, 452 U.S. 61, 75-76 (1981). The mere fact that it is student speech that is being restricted does not transform the analysis.

Indeed, *Tinker* and its progeny closely parallel this Court's speech jurisprudence in the non-school context, where the right to engage in core political and religious speech has been fervently guarded. For example, outside of the context of schools, the First Amendment does not protect "fighting words," *Chaplinksy v. New Hampshire*, 315 U.S. 568 (1942); in the *school* context, the First Amendment does not protect disruptive speech. *Tinker*, 393 U.S. at 513. Similarly, the First Amendment does not protect obscene speech in the non-school context, *Miller v. California*, 413 U.S. 15 (1973), and in the school-context does not protect "lewd" and "vulgar" speech. *Fraser*, 478 U.S. at 685. Accordingly, just as a city could not suppress core speech through a broad, but "facially neutral" prohibition on any and all signs in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), a school

district cannot suppress core speech in schools through a broad, but ostensibly "facially neutral" prohibition on written expression in this case. This is especially true when the existing authority granted to schools by this Court's student-speech jurisprudence undercuts any claim that sweeping, facially neutral restrictions on speech are a necessary means of furthering any legitimate goal of school officials.

Prohibiting civil speech and debate rights among our most impressionable and developing population segment is surely not what the Framers or the Court in *Tinker* had in mind. While the challenge in this case is directed at enforcement of a rule in elementary schools, that rule is equally applicable to all students in all grades. Thus, no student could be assured of his or her right to express views on *any* issue of public concern.

B. The "Material And Substantial Disruption" Exception To Tinker Is A Flexible Standard That Sufficiently Accommodates Disparities Between Students, Such As Age And Grade Level.

PISD's policy restricts the speech not only of elementary-aged children such as the Petitioners in this case—who, indeed, are themselves now several years older than they were when the events giving rise to this case first occurred—but applies to *all* grade levels. App. 98. PISD's *legitimate* interests—*i.e.*, preventing substantially and materially disruptive speech—are fully served under the existing *Tinker* standard with respect to *all* grades—

K through 12—because of the inherent flexibility of the "substantial disruption standard."

To be sure, even elementary-aged students enjoy constitutional speech rights just as they enjoy due process and Fourth Amendment protection. *See, e.g., Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1298 (7th Cir. 1993) (noting that "nothing in the First Amendment postpones the right of religious speech until high school"). Amici recognize, however, that what might fairly be considered "disruptive" speech will vary depending on the speaker and the audience. As this Court has explained, a student's right to express a point of view in a public school is as extensive as "the special characteristics of the school environment" permit. *Tinker*, 393 U.S. at 506; *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995) ("the nature of [student] rights is what is appropriate for children in school"). The characteristics of a kindergarten classroom—in which young children's study may include topics such as colors and rhyming words—are substantially different from the characteristics of a high school classroom in which students are expected to be capable of discussing genocide in Darfur. What would be considered "disruptive" would certainly vary between those two environments. The protection of non-disruptive speech is, however, critical in a civil society.

Tinker's substantial and material disruption standard is sufficiently flexible to account for the differences in maturity between elementary school and older children, and, in any event, provides administrators the authority needed to assure the

educational integrity of the classroom at all grade levels. Accordingly, there is no need or justification for a wholesale abolition of speech—such as the standard now being applied by the Fifth Circuit—to accommodate the unique circumstances of a grade school rather than high school classroom.

C. Permitting A Wholesale Content- And Viewpoint-Neutral Ban On All Speech Or A Form Of Speech As An Alternative To The *Tinker* Standard Will Result In The Erosion And Eventual Elimination Of Student Speech In School At Great Cost To Societal Interests.

Under Fifth Circuit precedent, school administrators have two choices. They can expend the proper time and effort to craft prudently tailored policies to prohibit disruptive speech, but which do not enable administrators to restrict other types of "protected" speech that they find undesirable. Or they can simply enact a broad, blanket prohibition that shuts down all student speech. There is a strong basis for believing that—given those two choices—many school administrators will select the path of least resistance. And, often times, the protected speech driving the adoption of such policies will be religious or political insofar as that speech is typically the most controversial and, thus, the speech that administrators are most interested in censoring.

The unfortunate effect of such policies will be generations of Americans ill-prepared for meaningful social, religious, and political discourse. To the extent such sweeping bans are selectively enforced—singling out the less preferred speech—students and

parents alike will simply be left to brood or litigate the as-applied question, passing the issue to the courts, albeit in a different form.

1. Schools Will Use Broad, Facially Neutral Bans On Speech As A Pretext To Target Religious And Political Speech.

Religious and political speech are the most likely types of speech to be the *real* target of broad speech restrictions for the simple reason that it is the form of speech over which people most often disagree. It is that very disagreement that will motivate some students to speak out and others to complain. Rather than risk complaints from students, teachers, or citizens who disagree with some controversial student speech, the easy course in many districts will be to suppress all speech, thus eliminating all controversial speech, and thereby—administrators will hope—avoiding all controversy.

Many school administrators will seek to avoid religious speech out of fear of controversy and litigation. This is somewhat ironic, of course, given that religious speech "is at the core of the First Amendment." Douglas Laycock, *High-Value Speech and the Basic Educational Mission of a Public High School: Some Preliminary Thoughts*, 12 LEWIS & CLARK L. REV. 111, 123-24 (2008); *see Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.") (emphasis in original). This

Court has repeatedly held that non-disruptive private religious speech is protected in public schools. *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *cf. Widmar v. Vincent*, 454 U.S. 263 (1981) (same issue at university level).

Despite this, "[s]chools have repeatedly claimed that the Establishment Clause requires or justifies them in censoring religious speech, on grounds derived from their own confused definition of their mission." *Laycock*, *supra*, at 124-25. "Because the Establishment Clause prohibits *schools* from promoting religion, some schools conclude that any *student* speech promoting religion is inherently inconsistent with the educational mission of the school." *Id.* at 125. Just as some school administrators resist this Court's decisions restricting school-sponsored prayer, and try to inject as much religion as they can into the school's own speech, other school administrators resist this Court's religious-free-speech decisions and seek to suppress all mention of religion lest they be accused of encouraging or promoting religious speech.

The Fifth Circuit's precedent, if left unchecked, arms such administrators with what they believe to be yet another means of avoiding Establishment Clause concerns. In actuality, it not only runs contrary to longstanding principles of free speech, but in fact subverts the many long-standing principles of religious exercise described above.

2. Broad Bans On Student Speech Will Have A Detrimental Societal Effect.

Just under 50 million Americans attend public K-12 schools.[2] Only a little more than half of those students will attend college, and many of those will not attend college for long. Thus, the majority of the civic training of the country's young adults, many of whom will vote and establish their own households shortly upon graduating, occurs in the public schools.

It is hardly surprising then that this Court has consistently recognized that public education is "the very foundation of good citizenship." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *see also Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 866-68 (1982); *West Virginia State. Bd. of Educ. v. Barnette,* 319 U.S. 624, 637 (1943). Accordingly, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (*citing Shelton v. Tucker*, 364 U.S. 479, 487 (1960)). This is because the "process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the . . . class." *Fraser*, 478 U.S. at 683. Rather, teachers and administrators "influence the attitudes of students toward government, the political process, and a citizen's social responsibilities," *Ambach v. Norwick*, 441 U.S. 68, 79 (1979), as well as "inculcate the habits and

[2] Maria Glod, *A Changing Student Body*, WASH. POST, June 1, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/05/31/AR2009053102229.html. (last visited 4/15/2010).

manners of civility." *Fraser*, 478 U.S. at 681. But when schools teach constitutional freedoms in theory yet fail to honor them in practice, they "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Barnette*, 319 U.S. at 637.

That is precisely the effect of the broadly suppressive though purportedly neutral speech restrictions involved in this case. The Fifth Circuit and other Circuits that have endorsed neutrality as a sufficient justification to suppress student speech have taken a first step toward approving the transformation of schools into the totalitarian enclaves that this Court condemned in *Tinker*.

The lessons of citizenship can be neither taught nor learned in this type of oppressive environment. Instead of being taught to value civil speech and debate—including non-disruptive core political and religious speech—students are taught that student speech, which is neither lewd nor supportive of illegal drug use, may nonetheless be suppressed by the state on the most hollow of grounds.

II. THE DISTRIBUTION OF THE WRITTEN WORD LIES AT THE HEART OF THE FIRST AMENDMENT.

The *O'Brien* standard applied by the Fifth Circuit is a particularly poor fit for the student speech at issue in this case because *O'Brien* addressed conduct that was symbolic—not the pure speech engaged in by Petitioners. *See United States v. O'Brien*, 391 U.S. 367, 377 (1968). Of course,

written expression—which is exactly what PISD's policy seeks to restrict—is at the very heart of the First Amendment, and such expression has long been critical to furthering society's most profound debates. Historically, written communications have been especially important for voices challenging authority and orthodoxy. Such controversial expression drove the Protestant Reformation, the American Revolution, and the ratification of the Constitution. Yet the Bible, the *Declaration of Independence*, *Common Sense*, and the *Federalist Papers* are all documents that could not be distributed among students in the Plano schools without fear of official discipline. Indeed, students complaining of PISD's policy could not even underline the First Amendment or a copy of *Tinker* and exchange it with a classmate, or circulate a petition to present to the principal. In fact, if the policy is to be evenly enforced, they will not be permitted to exchange birthday or holiday cards, candy hearts on Valentine's Day, or share clippings from the local newspaper.

The fact that such policies may be used, as in this case, as a pretext to suppress religious speech places the Fifth Circuit's ruling even further at odds with this Court's precedent. The distribution of religious literature is protected *both* as speech and as free religious exercise. In *Murdock v. Pennsylvania*, this Court noted that "hand distribution of religious tracts...has been a potent force in various religious movements down through the years...[and] occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the

more orthodox and conventional exercises of religion." 319 U.S. 105, 108-09 (1943).

By endorsing sweeping, deliberately overbroad restrictions on the distribution of written materials by its students, the Fifth Circuit has rejected *Tinker* and the lessons of history that gave rise to the First Amendment.

Amici urge the Court to grant certiorari and reverse.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari.

Respectfully submitted,

ILYA SHAPIRO
KATY NOETH
CATO INSTITUTE
1000 Mass. Ave., NW
Washington, DC 20001
(202) 842-0200

DAVID J. SCHENCK
(Counsel of Record)
ROBERT S. HILL
RICHARD D. SALGADO
ANDREW O. WIRMANI
JONES DAY
2727 North Harwood St.
Dallas, TX 75201-1515
Tel: (214) 220-3939
dschenck@jonesday.com
Counsel for Amici Curiae

April 19, 2010

APPENDIX

INTERESTS OF THE AMICI

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs with the courts—including in a variety of First Amendment cases, as well as in others involving student rights. Cato files the instant brief to address the need to clarify constitutional speech protections in the face of heavy-handed government regulations.

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan, law firm dedicated to protecting the free expression of all religious traditions. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. In particular, the Becket Fund has vigorously advocated for the right of religious individuals and institutions to express their beliefs freely and peacefully.

The National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 50 member denominations and associations, representing 45,000 local churches and over 30 million Christians. NAE

serves as the collective voice of evangelical churches and other religious ministries. That religious speech is often the first target of the censor goes at least as far back as John Milton's *Areopagitica* (1644). Its protection is imperative. NAE also believes that religious freedom is a gift from God that the government does not create but is charged to protect. NAE is grateful for the American constitutional tradition safeguarding religious freedom, and believes that jurisprudential heritage should be maintained in this case.

160

(2)

No. 09-1131

Supreme Court, U.S.
FILED
APR 19 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DOUG MORGAN; ROBIN MORGAN; JIM SHELL; SUNNY SHELL; SHERRIE VERSHER; AND CHRISTINA WADE,

Petitioners,

v.

PLANO INDEPENDENT SCHOOL DISTRICT, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICUS CURIAE CLAREMONT INSTITUTE FOR THE STUDY OF STATESMANSHIP AND POLITICAL PHILOSOPHY SUPPORTING PETITIONERS

EDWIN MEESE, III
75th U.S. Attorney General
TODD F. GAZIANO
214 Massachusetts Ave., N.E.
Washington, D.C. 20002
(202) 608-6180

AARON M. STREETT
Counsel of Record
BAKER BOTTS L.L.P.
910 Louisiana Street
Houston, Texas 77002
(713) 229-1234
aaron.streett@bakerbotts.com

(Additional Counsel Listed On Inside Cover)

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

CHAD PINSON
RYAN BANGERT
ELIZABETH WIRMANI
JON MUREEN
BAKER BOTTS L.L.P.
2001 Ross Avenue
Dallas, Texas 75201
(214) 953-6500

Counsel for Amicus Curiae Claremont Institute for the Study of Statesmanship and Political Philosophy

TABLE OF CONTENTS

	Page
Introduction	1
Interest Of Amicus Curiae	1
Summary Of Argument	2
Argument	4
I. Public Schools Are Charged With The Vital Task Of Training Students To Become Citizens.	4
II. *Tinker* Provides A Workable Standard That Accommodates The First Amendment Rights Of Students While Allowing School Authorities To Maintain Order By Prohibiting Disruptive Speech.	5
III. Application Of The *O'Brien* Standard To Restrictions On Pure Speech Will Undermine The Ability Of Public Schools To Prepare Students For Citizenship.	8
CONCLUSION	14

TABLE OF AUTHORITIES

Page

CASES

A.M. v. *Cash*,
585 F.3d 214 (5th Cir. 2009) 8

Ambach v. *Norwick*,
441 U.S. 68 (1979) 4

B.W.A. v. *Farmington R-7 Sch. Dist.*,
554 F.3d 734 (8th Cir. 2009) 8

Barnes v. *Glen Theater, Inc.*,
501 U.S. 560 (1991) 11

Barr v. *Lafon*,
38 F.3d 554 (6th Cir. 2008) 8

Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. *Pico*,
457 U.S. 853 (1982) 5, 8

Bethel Sch. Dist. No. 403 v. *Fraser*,
478 U.S. 675 (1986) 4, 6

Brown v. *Bd. of Educ.*,
347 U.S. 483 (1954) 4

Canady v. *Bossier Parish Sch. Bd.*,
240 F.3d 437 (5th Cir. 2001) 11

Citizens United v. *Fed. Election Comm'n*,
130 S.Ct. 876 (2010) 3

Gillman v. Sch. Bd. for Holmes County, Fla,
567 F. Supp. 2d 1359 (N.D. Fla. 2008) 8

Guiles v. *Marineau*,
461 F.3d 320 (2d Cir. 2006) 8

Hazelwood Sch. Dist. v. *Kuhlmeier*,
484 U.S. 260 (1988) 6

TABLE OF AUTHORITIES—Continued

Page

Henerey v. *City of St. Charles, Sch. Dist.*, 200 F.3d 1128 (8th Cir. 1999) 7

Keyishian v. *Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1967) 5

Mardis v. *Hannibal Public Sch. Dist.*, #60, No. 08-63, 2010 WL 387423 (E.D. Mo. Jan. 25, 2010) 8

Morse v. *Frederick*, 551 U.S. 393 (2007) 6, 9, 10, 13

Ponce v. *Socorro Indep. Sch. Dist.*, 508 F.3d 765 (5th Cir. 2007) 7

Pounds v. *Katy Indep. Sch. Dist.*, 517 F. Supp. 2d 901 (S.D. Tex. 2007) 12

Raker v. *Fredrick County Pub. Schs.*, 470 F. Supp. 2d 634 (W.D. Va. 2007) 7

Shelton v. *Tucker*, 364 U.S. 479 (1960) 5

Sweezy v. *New Hampshire*, 354 U.S. 234 (1957) 5

Texas v. *Johnson*, 491 U.S. 397 (1989) 11

Tinker v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969) ..... Passim

TABLE OF AUTHORITIES—Continued

Page

United States v. O'Brien,
391 U.S. 367 (1968) 3, 10

Virginia v. *Black*,
538 U.S. 343 (2003) 10

Walker-Serrano v. *Leonard*,
325 F.3d 412 (3rd Cir. 2003) 7

West Virginia State. Bd. of Educ. v.
Barnette,
319 U.S. 624 (1943) 2, 4, 5

INTRODUCTION

This case arises from Respondents' efforts to prohibit the peaceable distribution by elementary school students of written materials, including pencils and cards attached to candy canes, containing "religious" words such as "Christmas" and "Jesus." Respondents contend that the prohibition of such materials meets constitutional muster so long as it is accomplished pursuant to a far-reaching and putatively viewpoint-neutral policy that touches nearly every form of written communication. Respondents have a demonstrated history, however, of employing catch-all policies to prohibit disfavored "religious" messages while allowing non-religious messages to advance unabated. Petitioners now ask the Court to consider whether the Respondents' latest iteration of a far-reaching policy governing the "distribution of nonschool literature" is constitutionally sound.

INTEREST OF *AMICUS CURIAE*

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a nonprofit organization dedicated to the task of restoring the principles of the American Founding to their rightful, preeminent authority in our national life. The Claremont Institute publishes the *Claremont Review of Books*, sponsors the Publius and Lincoln Fellowships for rising young leaders, and administers a variety of public policy programs, including Americans for Victory Over Terrorism, the Ballistic Missile Defense Project, the Center for Constitutional Jurisprudence, the Center for Local Government, and the Salvatori Center for the American Constitution.

The Claremont Institute is strongly dedicated to the task of training and equipping students with the habits, virtues, and mores necessary for active and engaged

citizenship. The Claremont Institute accordingly has a substantial interest in safeguarding the role of our public schools as training grounds for future citizens by, *inter alia*, advocating for application of the proper legal standard to restrictions on student speech such as the literature distribution policy at issue here.[1]

SUMMARY OF ARGUMENT

This case concerns the proper legal standard for judging the constitutionality of a policy that severely limits the ability of public school students to peacefully distribute written materials that reflect their religious and political beliefs. But this case's implications are far broader. The Court's decision will profoundly affect the ability of public schools to fulfill one of their most vital missions—the education of our young for citizenship—which cannot be achieved without "scrupulous protection of Constitutional freedoms of the individual." *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 637 (1943).

The petitioners, a group of students and their parents, argue that the constitutionality of Plano Independent School District's ("PISD") literature-distribution policy must be measured against the standard for student speech articulated in *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). The courts below rejected this approach, finding instead that

---

[1] Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and its counsel made such a monetary contribution. Counsel of record for both petitioners and respondents were notified of *amicus*'s intent to file this brief 6 days before the brief's due date. The parties have consented to the filing of this brief, and their letters granting such consent have been filed with the Clerk's office.

PISD's policy should be evaluated using the more lenient *O'Brien* standard, which this Court has applied to "incidental limitation[s]" on "expressive conduct," such as nude dancing and draft-card burning. *See United States* v. *O'Brien*, 391 U.S. 367, 376 (1968).

The *Tinker* standard—which allows student speech so long as it does not "materially and substantially disrupt the work and discipline of the school"—best accommodates the need to maintain both order and responsible freedom of speech in public schools, thus facilitating the inculcation of good citizenship. *See Tinker*, 393 U.S. at 513. The *O'Brien* standard, by contrast, emphasizes order at the expense of freedom. It is a standard better suited for so-called expressive conduct—not speech at the core of the First Amendment.

As this case demonstrates, the *O'Brien* test allows schools to effectively silence students who seek, in a respectful and appropriate manner, to profess religious or political ideals different from those advocated by the school itself. This ability to peaceably debate differences and challenge prevailing orthodoxy is the DNA of republican citizenship. Indeed, this Court has recently declared that "[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United* v. *Fed. Election Comm'n*, 130 S.Ct. 876, 898 (2010). Instead of nurturing these habits of citizenship, the *O'Brien* standard adopted by the courts below threatens to turn public schools into "enclaves of totalitarianism"—precisely what this Court has said they must not become. *Tinker*, 393 U.S. at 511.

ARGUMENT

I. Public Schools Are Charged With The Vital Task Of Training Students To Become Citizens.

Public education is about much more than book learning or preparing students to be productive workers. It is "the very foundation of good citizenship." *Brown* v. *Bd. of Educ.*, 347 U.S. 483, 493 (1954). Accordingly, public schools must "awak[en] the child" to the values that sustain our constitutional republic. *Id.* Classroom teachers "influence the attitudes of students toward government, the political process, and a citizen's social responsibilities," *Ambach* v. *Norwick*, 441 U.S. 68, 79 (1979), and "inculcate the habits and manners of civility." *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 681 (1986). The habits and manners of a free people include tolerance and consideration of a range of divergent political and religious views. *Id.*

The "process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the . . . class." *Id.* at 683. Public schools must do more than teach abstract principles of good citizenship; they must also serve as controlled laboratories for students to responsibly practice their constitutional freedoms. Only then can "schools . . . teach *by example* the shared values of a civilized social order." *Id.* (emphasis added). Because students learn by doing, they do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506.

When schools teach constitutional freedoms in theory but do not honor them in practice, they "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Barnette*, 319 U.S. at 637. It is access to ideas and freedom "to inquire, to study and to evaluate, to gain new

maturity and understanding," *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957), that prepare students for "active and effective participation in [a] pluralistic, often contentious society." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26* v. *Pico*, 457 U.S. 853, 868 (1982). Indeed, the "Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection." *Keyishian* v. *Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (citation and internal quotation marks omitted). For this reason, "[t]he vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools." *Keyishian*, 385 U.S. at 603 (citing *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960)); *see also Barnette*, 319 U.S. at 637 (that schools "are educating the young for citizenship is reason for scrupulous protection of" students' liberties). Policies that unduly restrict the core constitutional freedoms essential to the development of active citizenship defeat the this critical purpose of public education.

This case pointedly raises the question, with respect to student speech, of what legal test will best ensure orderly learning within public schools while at the same time protecting the historical role of public schools as laboratories of responsible citizenship. The Court has addressed, and answered, this question in *Tinker*.

II. *Tinker* Provides A Workable Standard That Accommodates The First Amendment Rights Of Students While Allowing School Authorities To Maintain Order By Prohibiting Disruptive Speech.

For forty years, courts have applied *Tinker* and its progeny to strike a finely-tuned balance between

maintaining order in public schools and allowing students to responsibly exercise their core First Amendment freedoms. The *Tinker* standard provides space for students to respectfully discuss political, social, and religious issues without surrendering public schools to chaos, offensive behavior, or violence. *Tinker* thus preserves the public school's role as a laboratory of citizenship and provides an important check on overzealous school administrators who would inadvertently squelch the inculcation of the habits of civilized discourse on which a free republic depends.

The essential elements of the *Tinker* standard are clear and well established. Students possess First Amendment rights that they do not surrender when they pass through the "schoolhouse gate." *Tinker*, 393 U.S. at 506. However, the First Amendment rights of students in public schools are not "automatically coextensive with the rights of adults in other settings." *Fraser*, 478 U.S. at 682. Rather, they may be circumscribed "'in light of the special characteristics of the school environment.'" *Morse* v. *Frederick*, 551 U.S. 393, 405 (2007) (quoting *Tinker*, 393 U.S. at 506). Accordingly, public school officials may regulate student speech occurring at school when (i) officials have reason to believe that the speech will substantially disrupt the work of the school or infringe the rights of other students, *Tinker*, 393 U.S. at 513; (ii) the speech is lewd or vulgar, *Fraser*, 478 U.S. at 685; (iii) the speech bears the imprimatur of the school, *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260, 273 (1988); or (iv) the speech advocates the use of illegal narcotics. *Morse*, 551 U.S. at 409-410. Speech outside of these categories, however—such as the students' respectful political and religious speech in this case—is presumptively protected.

Taken together, this body of principles affords students the ability to practice their First Amendment rights while respecting public school officials' need to restrict speech that is disruptive either because of its content or the context in which it occurs. This body of principles has likewise provided courts with workable yet flexible guideposts when grappling with difficult issues relating to school speech. Applying *Tinker* and its progeny, courts have:

- Upheld disqualification of a class-president candidate who distributed condoms attached to his campaign fliers. *Henerey* v. *City of St. Charles, Sch. Dist.*, 200 F.3d 1128, 1132-1136 (8th Cir. 1999).
- Granted a preliminary injunction permitting a student to distribute anti-abortion literature during non-instructional times. *Raker* v. *Fredrick County Pub. Schs.*, 470 F. Supp. 2d 634, 640 (W.D. Va. 2007).
- Upheld bans on student speech that threatened a Columbine-style attack on the school, a teacher, or both. *Ponce* v. *Socorro Indep. Sch. Dist.*, 508 F.3d 765, 768-772 (5th Cir. 2007).
- Recognized a student's First Amendment right to wear a t-shirt depicting President George W. Bush in a highly unflattering light. *Guiles* v. *Marineau*, 461 F.3d 320, 324-331 (2d Cir. 2006).
- Upheld prohibition of a student's petition, which stated that "[w]e 3rd grade kids don't want to go to the circus because they hurt animals" because the student sought to circulate the petition during a quiet reading period, on an icy playground, and without prior approval as required by the school's literature distribution policy. *Walker-Serrano* v. *Leonard*, 325 F.3d 412 (3rd Cir. 2003).
- Recognized a student's right to display pro-homosexual symbols, including rainbows and pink

triangles. *Gillman* v. *Sch. Bd. For Holmes County, Fla.*, 567 F. Supp. 2d 1359 (N.D. Fla. 2008).

- Upheld a high school policy prohibiting the visible display of the Confederate battle flag on the school campus. *A.M.* v. *Cash*, 585 F.3d 214 (5th Cir. 2009); *B.W.A.* v. *Farmington R-7 Sch. Dist.*, 554 F.3d 734 (8th Cir. 2009); *Barr* v. *Lafon*, 538 F.3d 554 (6th Cir. 2008).

- Upheld the suspension of a high school sophomore for sending an instant message via his home computer to a classmate threatening to kill other classmates. *Mardis* v. *Hannibal Pub. Sch. Dist., #60*, No. 08-63, 2010 WL 387423 (E.D. Mo. Jan. 25, 2010).

As these cases demonstrate, *Tinker* and its progeny allow targeted speech restrictions to preserve the educational environment. But *Tinker* does not countenance unnecessarily broad bans on religious and political speech that would needlessly interfere with students' preparation for "active and effective participation in [a] pluralistic, often contentious society." *Pico*, 457 U.S. at 868.

III. Application Of The *O'Brien* Standard To Restrictions On Pure Speech Will Undermine The Ability Of Public Schools To Prepare Students For Citizenship.

The courts below discarded *Tinker* and employed the intermediate-scrutiny standard applicable to expressive conduct like nude dancing and draft-card burning to judge the constitutionality of PISD's literature distribution policy. They did so based on the fallacy that *Tinker* does not apply to viewpoint-neutral suppression of religious speech. This Court's recent decision in *Morse* v. *Frederick*, however, reaffirms that *Tinker* is the proper standard to assess *all* restrictions of core political and religious speech. If permitted to stand, the approach followed by the courts below would permit public schools

to transform themselves into totalitarian enclaves in which core political and religious speech could be stifled by facially viewpoint-neutral regulations. Such a result is both inconsistent with this Court's precedents and inimical to the school's task of preparing students for lives of engaged citizenship.

In the context of pure student speech, *Tinker* and its progeny provide the appropriate standards for judging time, place, and manner restrictions on literature distribution. *Tinker* itself expressly sets forth the standard for judging regulation of the time, place, and manner of student speech:

> [C]onduct by the student, in class or out of it, which for any reason—whether it stems from *time*, *place*, or *type of behavior*—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

Tinker, 393 U.S. at 513 (emphasis added). *Tinker* thus creates its own time, place, and manner standard that permits speech restrictions that are reasonably necessary to avoid disruption. In many cases, *Tinker* and its progeny afford public school officials *greater* leeway to regulate the time, place, and manner of student speech than does traditional time, place, and manner analysis by allowing schools to *completely ban* disruptive, lewd, or drug-related speech. *See, e.g.*, *Morse*, 551 U.S. at 405 ("Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected. In school, however, Fraser's First Amendment rights were circumscribed in light of the special characteristics of the school environment." (citations and internal quotation marks omitted)). But *Tinker* also ensures that school officials cannot willy-nilly

suppress core religious and political speech without a reasonable forecast of disruption.

This Court in *Morse* reaffirmed that political and religious speech lies "'at the core of what the First Amendment is designed to protect.'" *Morse*, 551 U.S. at 403 (quoting *Virginia* v. *Black*, 538 U.S. 343, 365 (2003)). *Morse* emphasized that *Tinker* continues to apply to restrictions on political and religious speech, *id.* at 403-404, and repeatedly distinguished the speech in *Morse* as having no political or religious content. *Id.* at 403 ("not even Frederick argues that the banner conveys any sort of political or religious message"); *id.* at 406 n.2 ("there is no serious argument that Frederick's banner is political speech"). Likewise, in his concurrence, Justice Alito strongly reaffirmed *Tinker* and joined the majority opinion "on the understanding that . . . it provides no support for *any restriction* of speech that can plausibly be interpreted as commenting on any political or social issue[.]" *Id.* at 422 (emphasis added). Thus, this Court has plainly signaled its intent to judge all restrictions on political and religious speech—even facially viewpoint-neutral ones—under the *Tinker* standard.

The *O'Brien* test is not the appropriate standard with which to evaluate even facially viewpoint-neutral suppression of pure political or religious speech in the public school context. *O'Brien* involved a First Amendment challenge to a federal statute prohibiting the knowing destruction or mutilation of draft cards. *O'Brien*, 391 U.S. at 369-370. Applying a form of intermediate scrutiny, the Court held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* at 376. Accordingly, *O'Brien* applies solely to

regulations of "noncommunicative conduct" that generate incidental limitations on speech. *Texas* v. *Johnson*, 491 U.S. 397, 403 (1989); *id.* at 410 (refusing to apply *O'Brien* to ban on flag burning); *Barnes* v. *Glen Theater, Inc.*, 501 U.S. 560, 567 (1991) (holding that a statute barring nude dancing was "justified despite its incidental limitations on some expressive activity"). *O'Brien* is not suitable for judging a policy expressly restricting the distribution of *written political or religious literature* by public school students.

Use of *O'Brien* in this case is improper because it uses the standard for judging regulations of *expressive conduct* to evaluate a school policy regulating *pure speech*. The courts below relied upon *Canady* v. *Bossier Parish School Board*, 240 F.3d 437 (5th Cir. 2001) to support their application of *O'Brien* to PISD's literature-distribution policy. *Canady*, however, addressed the constitutionality of a content-neutral uniform policy governing the type of clothing that students could wear to school. The *Canady* Court believed that *Tinker* applies only to "school regulations directed at specific student viewpoints," and therefore was inapplicable to a school uniform policy that was "completely viewpoint-neutral." *Id.* at 442-43. The Court opted instead to assess the uniform policy using the "time, place and manner analysis and the *O'Brien* test for expressive conduct," which the Court found were "virtually the same standards." *Id.* at 443.

While the *O'Brien* standard applied in *Canady* might make sense when applied to school uniform regulations that incidentally limit expressive conduct, it should not be extended to cover school policies that directly restrict pure speech. Doing so would afford inadequate protection to non-disruptive student speech regarding political and religious issues—speech that lies at the core

of the First Amendment and is essential to learning the habits of citizenship. The necessity of protecting this type of high-value speech is central to the *Tinker* line of cases, including the Court's most recent pronouncement in *Morse*. Viewed against this backdrop, the court of appeals' decision to afford student religious speech no more protection than nude dancing—and less protection than flag burning—simply cannot stand.

The facts of this case illustrate the harsh results that occur when *O'Brien*-style analysis, and not *Tinker*, is used to evaluate school policies restricting pure political and religious speech. Applying *O'Brien*, the courts below upheld a policy that permitted PISD to, *inter alia*, confiscate pencils bearing positive religious messages from elementary school students; prohibit a third-grade student from distributing candy canes to his classmates at a school Christmas party because the candy canes were affixed to cards bearing a religious poem; and prohibit a second-grade student and a fifth-grade student from distributing free tickets to events at their respective churches on the ground that religious announcements were prohibited. *See also Pounds* v. *Katy Indep. Sch. Dist.*, 517 F. Supp. 2d 901 (S.D. Tex. 2007) (employing *O'Brien* to uphold similar overreaching limitations on such student speech as the use of the words "Merry Christmas" at school Christmas parties and talking about Jesus "rather than eggs and jellybeans" at Easter).

PISD made no effort to justify these actions under *Tinker*, *Fraser*, *Kuhlmeier*, or *Morse*. Rather, PISD argued—and the district court and court of appeals agreed—that these actions were proper because they were based upon a facially viewpoint-neutral policy governing the distribution of written literature on campus. This approach sanctions the transformation of PISD into the type of speech-free zone that this Court

deplored in *Tinker*. The virtues and habits of citizenship can be neither taught nor learned in such an environment. Rather than being taught to value speech—including core political and religious speech—students are taught that non-disruptive student speech, which is neither lewd nor supportive of illegal drug use, may nonetheless be stifled by the state on the flimsiest of grounds.

Perhaps more importantly, application of *O'Brien*-style intermediate scrutiny to policies such as PISD's literature distribution policy allows school officials to indoctrinate students in state-approved views without affording students an opportunity to raise dissenting views. Students are required by law to spend a substantial portion of their lives at school. While at school, the right of students to speak is necessarily limited. The state, on the other hand, may speak freely to these students through its officials. Justice Alito, in his concurring opinion in *Morse*, recognized the dangers inherent in this imbalance of power. Rejecting the argument that school officials should be permitted to censor student speech that interferes with the school's "educational mission," Justice Alito wrote:

> This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs. The "educational mission" of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.

Morse, 551 U.S. at 423 (Alito, J., concurring).

This case demonstrates that the rejection of *Tinker*—and the adoption of intermediate scrutiny—could facilitate the same type of subtle brainwashing against which Justice Alito cautioned. School administrators who set the agenda for their schools must not be allowed to use facially viewpoint-neutral restrictions to marginalize student speech that would be acceptable under *Tinker* and *Morse*. This Court should apply the teachings of those cases and reinforce the long-recognized role of public schools as laboratories of citizenship.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

AARON M. STREETT
Counsel of Record
BAKER BOTTS L.L.P.
910 Louisiana Street
Houston, Texas 77002
(713) 229-1234
aaron.streett@bakerbotts.com

EDWIN MEESE, III
75th U.S. Attorney General
TODD F. GAZIANO
214 Massachusetts Ave., N.E.
Washington, D.C. 20002
(202) 608-6180

CHAD PINSON
RYAN L. BANGERT
ELIZABETH WIRMANI
JON MUREEN
BAKER BOTTS L.L.P.
2001 Ross Avenue
Dallas, Texas 75201
(214) 953-6500

Counsel for Amicus Curiae Claremont Institute for the Study of Statesmanship and Political Philosophy

April 19, 2010